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The Supreme Court of Canada  
as a Bilingual and  
Bicultural Institution

Documents of the  
Royal Commission on  
Bilingualism and  
Biculturalism

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1 Peter H. Russell

*The Supreme Court of Canada as a Bilingual  
and Bicultural Institution*

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The Supreme Court  
of Canada  
**1** as a Bilingual  
and Bicultural  
Institution

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Peter H. Russell

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The immediate purpose of this study is to see how the Supreme Court of Canada functions from the point of view of bilingualism and biculturalism. "From the point of view of bilingualism and biculturalism" is an awkward and ambiguous phrase, but still it is the appropriate way to refer to the terms of reference of this, and, one suspects, many of the other studies prepared for the Royal Commission on Bilingualism and Biculturalism. For while one may be fairly clear about what is involved in applying the norm of "bilingualism" to an institution, it is much more difficult to grasp the "problem of biculturalism," particularly with regard to a court of law.

It was in order to identify the central issues of biculturalism and bilingualism as they relate to Canada's judicial structure and weigh their significance within the broad context of Canadian life that the first two chapters of the study were undertaken. The first chapter provides an account of the Supreme Court of Canada from its conception to its emergence in 1949 as Canada's ultimate court of appeal. In this historical section of the work we have tried to trace the ways in which Canadians have experienced the Supreme Court as a bicultural and bilingual institution. In the following chapter we have analyzed the major perspectives or values which might now serve as a basis for examining and assessing the Court. The object of that analysis is twofold: first, to put the bilingual and bicultural issues in perspective by setting them beside and relating them to other concerns which Canadians might have about the Supreme Court; and secondly, to draw out the specific questions relating to bilingualism and biculturalism which were to direct and inform our investigation of the contemporary Court.

The results of that investigation are summarized in the remaining three chapters of the study. Each of these chapters represents not so much a different question or issue as a different mode of inquiry. The third chapter we would characterize as a traditional study of the Supreme Court as an institution, concentrating on the Court's personnel and decision-making procedures, with special reference to bilingualism. The fourth chapter represents the most significant results

of a variety of attempts to amass quantitative evidence bearing upon the bicultural behaviour of the Court. The fifth brings together a number of case studies of those Supreme Court decisions which have had the most direct or dramatic impact on bilingual and bicultural issues.

All of this is followed by a short conclusion in which we have summed up our main findings concerning bilingualism and biculturalism in the Supreme Court and related them to our major proposals for reform of the Court and its role in the Canadian judicial structure. It should be stressed that these conclusions and recommendations are the author's not the Royal Commission's.

The reader will notice that there is much in this study which does not seem to be immediately relevant to the bilingual or bicultural aspects of the Supreme Court. We certainly make no apology for this, although some explanation is probably necessary. Aside from the obvious difficulty in distinguishing a bicultural issue from other issues (for instance, is a question concerning the Supreme Court's effect on federalism in part a bicultural question?), there is a larger reason for what some might regard as the extravagant breadth of this study. It must be remembered that there has not yet been a monograph, book, or full-length study of the Supreme Court or, for that matter, of any of Canada's judicial institutions. Consequently, much of the general background material concerning the Court had to be gathered and included in this study. If this material had been omitted from the study, many readers would not have been able to relate the bilingual and bicultural dimensions of the Court to the broad context of the Court's existence.

Our awareness of the fact that this was the first book-length study of the Supreme Court also prompted us to refer throughout to points of view other than bilingualism and biculturalism from which the Court might be approached. No one could question the importance of the Court's bicultural and bilingual dimensions: the Supreme Court of Canada owes much of its distinction to its role as the highest tribunal for two legal systems, with their roots in the two major legal traditions of the Western world. But as important as this characteristic of the Court is, it is not in our view the Court's only or even most important quality and, indeed, in the future, if recommendations similar to our own are followed, it might become a less important feature of the Court's role. Nor, as the final arbiter of our federal system and interpreter of our national laws, does the Court derive its most essential qualities from the fact that it carries out these functions for a national society made up of two major cultural groupings. To approach the Court exclusively from the perspective of bilingualism and biculturalism would be to risk blinding both ourselves and our readers to the Court's gravest problems as well as its highest possibilities.

I would like to acknowledge the assistance I received from many individuals in the planning and execution of this study. I am most grateful to Professor Henry Arthurs of the Osgoode Hall Law School, who served as my "legal conscience." Without his encouragement I



might not have undertaken certain parts of the study; without his advice at every stage of the project, I would have been guilty of even more legal "howlers." I am extremely grateful for the excellent work done by my three research assistants, John Cavarzan, Mrs. Leonard Shifrin, and Donald Brown. Besides the painstaking and intelligent labour of Mr. Cavarzan and Mrs. Shifrin in applying a questionnaire to each Supreme Court decision and Mr. Brown's perceptive formulation of the case-studies in Chapter V, all three contributed many useful ideas and insights to the general development of the study.

On the statistical and data-processing side I am most indebted to Dr. B. A. Griffith of K.C.S. Limited, Toronto. Dr. Griffith's advice in drafting the questionnaire used in Chapter IV and the programme he developed in order to produce all of our bloc-analysis tables by means of a computer were indispensable in carrying out the quantifying phase of our work. I would also like to thank Dr. John C. Johnstone of the National Opinion Research Center in Chicago for his help in drawing up the questionnaire used in Chapter III to solicit the opinion of French-speaking lawyers on language problems in the Supreme Court, and Professors Richard Judy and Yehuda Kotowitz of the Department of Political Economy, University of Toronto for their help and advice on a number of points in the quantitative study. Of course, for these colleagues and for all those whose assistance I have acknowledged, I offer, as security, acknowledgement of my own responsibility for anything in the text which might embarrass them.

Finally, and above all, I must record my deep sense of gratitude to the Royal Commission on Bilingualism and Biculturalism for agreeing to support this study. In particular I thank Professor Michael Oliver and Professor Léon Dion of the Research directorate for their encouragement and co-operation. Perhaps had this study been carried out independently it would have taken a form closer to the author's own convictions about the Supreme Court's role in Canadian life, and been executed more slowly and with greater sophistication. But there is a far greater likelihood that no study of the Court would have appeared at all.





It is not intended in this historical section to present, even in outline, a complete history of the Supreme Court of Canada. Parts of that history have been related in considerable detail before, and other parts are not immediately relevant to this inquiry into the bilingual and bicultural aspects of the Court. The purpose of this brief historical account is to provide an historical perspective for the analysis of the Court's current relationship to bicultural and federal issues. With this purpose in mind our main interest in this historical section is to trace the relationship of the Court, at each stage of its development, to bicultural or federal concerns. In particular we are interested in investigating the extent to which disagreement about the Court has been a source of tension between French- and English-speaking Canadians. In short, this is a political history of the Supreme Court of Canada with the focus on the Court's impact on bicultural and federal issues.

## *A. Origin*

### *1. At Confederation*

The Supreme Court was not one of those institutions which was either carefully planned or the object of difficult negotiations at the time of Confederation. The proposal to give the federal legislature the power to establish a general court of appeal in Canada does not appear to have excited much interest or controversy during the conferences and debates which led up to Confederation. Only one brief section of the new Constitution (Section 101) dealt with the possibility of establishing a Supreme Court. This Section merely permitted the Canadian Parliament to provide, at some future date, a general court of appeal for Canada, making no mention of the personnel of such a court, their method of appointment or the particulars of the court's jurisdiction. The same section also stated, rather elliptically, that Parliament could establish "any additional Courts for the better administration of the laws of Canada."<sup>1</sup>

This relatively uncontroversial and cursory treatment of the proposal for a general court of appeal reflects the fact that the judicial organization of the new state, compared to executive and legislative institutions, was not regarded as fraught with significant political implications. Certainly those involved in the Confederation movement did not envisage that their efforts would produce any fundamental change in the administration of justice in British North America. Although the B.N.A. Act, in addition to granting Parliament the power to establish federal courts, also gave the provinces the power to organize provincial courts of both civil and criminal jurisdiction, the exercise of these powers was not expected to result in the immediate establishment of a new set of Canadian courts. The basic judicial institutions of the new country were simply to be carried over from the pre-Confederation period, and this was provided for in Section 129 of the B.N.A. Act.

Similarly with appeals from provincial courts, there would be no immediate need for the general legislature to exercise the powers bestowed on it by Section 101, for already there existed a well-established right of appeal from the British North American colonies to the Judicial Committee of the Privy Council and this system of Privy Council appeals from the provincial courts would unquestionably be continued in the new Canada.<sup>2</sup> Indeed the fact that the colonists, both French and English, who worked out the Confederation arrangements had for several decades lived under the final appellate jurisdiction of the English Privy Council must have muted both the controversy and interest which the proposal for a federal appeal court might otherwise have aroused.

But while the provision for a general Canadian appeal court was far from being a central issue at the time of Confederation, it did seem important enough to be included as at least one of the possible institutions of the new country and it did excite some opposition. What were the main intentions of its original proponents and what were the chief complaints of its earliest opponents?

In reviewing the possible reasons for proposing a general court of appeal in Canada one is immediately struck by the tendency for each reason to suggest a possible objection to such a court. As Sir John A. Macdonald candidly admitted when referring to the proposed court in his opening speech in the Confederation Debates of 1865, "There are many arguments for and against the establishment of such a court."<sup>3</sup> And it was no doubt this rather close balance of pro's and con's which largely accounts for the eight-year delay in establishing the Supreme Court following Confederation.

Take even the most convenient, if not the most convincing, reason for including among the central legislature's powers the power to establish a general court of appeal: the fact that in keeping with Lord Durham's Report the Canadian Legislature established in 1841 had been given such a power.<sup>4</sup> This, indeed, was the only reason put forward by Sir John A. Macdonald in his speech in the Canadian Assembly. But as Macdonald himself acknowledged the Canadian Legislature had never seen fit to exercise this power—a fact which might suggest

either that the establishment of a general appeal court had not been an urgent necessity or that it was politically objectionable.

When we turn to the more tangible reason for establishing a Canadian Supreme Court, the most mundane argument which we encounter is that citing the saving in time and money which Canadian litigants would realize in not having to take their appeals to London. Many of the Court's supporters were inclined to push this consideration to the forefront of their arguments. This was simply on the ground that since the specific judicial functions which a Canadian Supreme Court might provide could be and, indeed in the absence of a Canadian Supreme Court, would be provided by the Judicial Committee of the Privy Council, the case for the Canadian Court must rest on the great convenience of having these judicial services provided in Canada rather than in England. However, the argument that a Canadian appeal court would save appellants from provincial courts the long and expensive trip to London could not be pushed very far without raising the question of the continuation of Privy Council appeals. If the right to appeal to "the foot of the throne" from Canadian courts was not to be abolished, then the argument for the Supreme Court based on convenience could hardly be sustained. In fact, just the opposite—the opponents of the Court could argue that it would only be an intermediate appellate court and, as such, simply another expensive step on the litigant's road to London.<sup>5</sup>

Here the Court's advocates found themselves in an ambivalent position, for, while they wanted to stress the economies which a Canadian court of appeal might afford Canadian litigants, they were completely unwilling to contemplate the abolition of Privy Council appeals. This ambivalence is well illustrated by Alexander Galt's explanation of the general appeal court's role in the Confederation scheme. After first stressing that as far as appeals to the Privy Council were concerned "it was not intended to deprive the subject of recourse to this ultimate court," he went on in the same passage to defend the plan for a Canadian appeal court in these terms: ". . . but at the same time, it was well, in assimilating the present systems of law, for the benefit of all the Provinces that they should have the assembled wisdom of the Bench brought together in a general court of appeal to decide ultimate causes, which would before long doubtless supersede the necessity of going to the enormous expense of carrying appeals to England."<sup>6</sup>

Following Confederation Sir John A. Macdonald's ministry never wavered in its determination to keep a Canadian general court of appeal at the level of an intermediate appeal court, with a final appeal to the Privy Council.<sup>7</sup> It was not until Alexander Mackenzie's Liberal government took over the sponsorship of the Supreme Court in 1875 that the nationalist aspiration of abolishing appeals to the Privy Council and making the Canadian Supreme Court a final appellate court came to the fore. Even then, the plan to prevent appeals from the Supreme Court to the Privy Council would have left intact the appeal from provincial courts to the Privy Council. So, at most, the Supreme Court would only provide an alternative final court of appeal for Canadian litigants.



Not only was the Supreme Court originally planned as an intermediate appeal court, but for at least the two provinces of Quebec and Ontario it would be an additional intermediate appeal court—a fact which was not apt to impress lawyers and jurists from those two provinces with the increased economies and convenience which might be afforded by such a court. Certainly one of the constant objections to the Supreme Court all through the period of its establishment, and for some time after, was the complaint that in Ontario and Quebec where provincial appeal courts already existed, it would create yet another opportunity for appeal. Consequently it would favour the more affluent litigant who might threaten to drag his poorer adversary through three or four appeal courts before accepting settlement in a case. The proposed Supreme Court was especially vulnerable to this line of attack from Quebeckers. In Quebec there was already an appeal from the court of first instance, the Superior Court, to the Court of Review, and after this there was provision for an appeal to the Court of Queen's Bench. It was only for the Maritime provinces where no courts of appeal had been established that there seemed to be a particularly strong case for providing a new Canadian appeal court.

But when the argument based on convenience and economy broke down, as it was apt to, proponents of the new Court had to adopt a larger rationale in which the Supreme Court was envisaged as an essential working organ in the governmental system of the new federal state. Here enforcement of federal laws, the adjudication of federal disputes, and the interpretation and application of the Constitution could be cited as functions which called for the organization of a federal judicial establishment in Canada. Sir John A. Macdonald later gave the following explanation of the evolution of his Supreme Court plans:

When the Supreme Court system was adopted as a portion of the constitution of British America, it was not adopted without grave consideration by those who were concerned in the original resolutions and in the adoption of the scheme which culminated in the British North America Act. It was considered that, following the example of the United States, there should be one Supreme Court of Appeal, to which all cases, arising, at all events, out of the laws of the Federal Parliament, might go for adjudication. It was afterwards pressed, and successfully pressed, that, as, with the exception of Ontario and Quebec, there were no courts of appeal in the Provinces, the court should not only be a court of appeal on dominion and constitutional questions relating to the laws passed by the Federal Parliament, but a supreme court of appeal, intermediate between the courts of original jurisdiction and the final court of appeal, the Judicial Committee of the Privy Council.<sup>8</sup>

Clearly, if Macdonald's memory was accurate, the Court's earliest advocates gave paramount importance to the Court's adjudication of federal and constitutional issues rather than its appellate jurisdiction over provincial law matters.

At the time of Confederation, and for a short time thereafter, there were certainly some who thought of Section 101 of the B.N.A. Act as leading logically to the development of a separate tier of federal courts specializing in federal legal matters, rather analogous to the American system. It will be recalled that in the Quebec Resolutions the federal legislature's power to establish a general appeal court and its power to establish additional courts for the enforcement of federal laws had been put forward as two separate powers.<sup>9</sup> While these powers had been brought together in the same section of the B.N.A. Act, they still suggested the possibility of linking to the Supreme Court's appellate responsibilities an extensive, and possibly exclusive, original jurisdiction over matters of federal import.

Further evidence of such intentions is amply provided by Sir John A. Macdonald's first Bill to establish a Supreme Court, drawn up in 1869.<sup>10</sup> This Bill vested in the Supreme Court exclusive original jurisdiction in a large number of matters, including all cases challenging the constitutionality of provincial or federal laws, cases involving the enforcement of Dominion revenue laws, cases involving the Crown (provincial or Dominion!) as a party, cases involving foreign governments or their representatives, cases concerning federal legislation implementing treaties and cases assigned to the Court by federal statutes.<sup>11</sup> In addition it gave the Supreme Court a concurrent original jurisdiction with the provincial courts in cases involving citizens of different provinces or foreign states.<sup>12</sup> It was this part of Sir John's proposal that aroused the most severe criticism and which eventually fell before a storm of provincial protest.

But short of these rather grandiose plans for a Supreme Court with an exclusive jurisdiction over important federal issues, most of the Court's sponsors expected a Canadian Supreme Court to play a major role in settling constitutional disputes and in creating greater uniformity in Canadian law. First, as for the task of determining the constitutional validity of federal and provincial Acts, there was some awareness of the crucial importance of the judiciary in general and of a federal Supreme Court in particular. We know that at the Quebec Conference several of the delegates in discussing the division of legislative powers proposed that a "Supreme Court of Appeal . . . decide any conflict between general and state rights."<sup>13</sup> Although there were others who, fearing the political power which would accrue to the courts under such a system of judicial review, argued that the incorporation of this system in the Canadian Constitution would "land us in [the] position of [the] United States by referring matters of conflict of jurisdiction to courts. You thus set them over the General Legislature."<sup>14</sup>

Considering how powerful the United States Supreme Court, through its exercise of judicial review, had by this time become in the American federal system, it is surprising that there was not more consideration by Canadians of the implications of judicial review and of the requisite qualities of the tribunal which would carry out this responsibility. Of course, one reason for the rather scanty



consideration of this issue was simply that regardless of what judicial instruments were designed for performing this task of judicial review in Canada, the Privy Council would continue to exercise a final control over the constitutionality of Canadian laws. Indeed, in this sense, judicial enforcement of the federal provisions of the B.N.A. Act could be viewed as a logical extension of imperial supervision of colonial legislation. As Sir John A. Macdonald observed at the Quebec Conference in replying to McCully's general criticism of judicial review, "Our Courts now can decide where there is any conflict between the Imperial and Canadian Statutes."<sup>15</sup> And, he might have added, the Canadian Constitution would take the form of an imperial statute.

But there was still a special function for a Canadian Supreme Court to serve in judging disputes involving the clash of Dominion and provincial powers. This was to provide a body of senior Canadian jurists who could guide the Canadian government in arriving at its own decisions as to the constitutionality of the federal Parliament's Acts or those of the provinces. The first few years following Confederation soon demonstrated that the division of legislative powers set down in the B.N.A. Act was far from unambiguous. Given the growing number of conflicts between federal and provincial legislation to which these ambiguities gave rise, the need was soon felt for a convenient and ready source of respectable juristic advice which could be given without waiting for doubtful laws to be challenged in the normal course of litigation. This advice, while lacking the formal status of a judicial decision,<sup>16</sup> could either be used directly by the federal government in deciding whether to disallow provincial Acts or indirectly as a guide for its own law-making and its negotiations with the provinces. Thus we find in the first Supreme Court Bill, drafted in 1869<sup>17</sup> and in every subsequent Supreme Court Act up to the present day,<sup>18</sup> the distinctive Canadian provision for advisory Supreme Court opinions on questions—particularly constitutional questions—submitted to it by the Canadian government. It should be emphasized that at this stage Macdonald intended this quasi-judicial power to be used as an instrument for federal supervision of provincial legislation: neither the 1869 nor the 1870 Bills provided the Supreme Court with the power to determine the constitutional validity of Acts of the federal Parliament.

Finally, the achievement of greater uniformity and coherence in the laws of Canada was, if not the clearest, at least the most contentious of the goals proposed for the general appeal court. As far as federal laws were concerned there was no question of the general appeal court's right and duty to ensure their uniform enforcement and interpretation either through the original jurisdiction of federal courts or through a national court's appellate jurisdiction over provincial courts. Both Galt<sup>19</sup> and Cartier<sup>20</sup> in their explanations of the general appeal court's functions emphasized this role, especially with relation to federal criminal law and commercial law. But there was a tendency to look for a broader process of legal assimilation which would touch the general jurisprudence of the country

including many of those matters subject to provincial legislative power under the B.N.A. Act. There was certainly constitutional support for this projected function of the Supreme Court as far as the common-law provinces were concerned, for both the Quebec Resolutions<sup>21</sup> and Section 94 of the B.N.A. Act looked forward to the provinces of Nova Scotia, New Brunswick and Ontario granting the federal legislature the power to establish uniform laws in relation to property and civil rights. However, even without the implementation of this uniformity clause, if appeal was to lie from provincial courts to the general appeal court in provincial law matters, this in itself would give the general appeal court a real opportunity to introduce a measure of uniformity into the provincial legal systems.

It was this possibility of the new federal Court's appellate jurisdiction extending to provincial law matters which touched off the strongest reaction against the Court during the Confederation Debates. The protests were voiced exclusively by representatives of Lower Canada. Their basic contention was that decisions dealing with Quebec's Civil Code rendered by provincial judges who had trained and practised in that legal system ought not to be reviewed by a court of appeal staffed by judges of whom only a minority would be versed in Quebec's civil law. The result of this system, to quote Joseph Cauchon, the most vehement spokesman of this position, "would be that those same laws would be explained by men who would not understand them, and who would, involuntarily perhaps, graft English jurisprudence upon a French Code of Laws."<sup>22</sup> It should be noted that not all of French Canada's spokesmen shared these anxieties. Indeed when Cauchon demanded that the sponsors of the Confederation proposals state whether the court of appeal would be a civil, as well as a constitutional tribunal, with jurisdiction over Quebec, Sir Georges-Étienne Cartier on behalf of the ministry gave a decidedly affirmative answer. After referring to the Court's role in administering federal laws he went on to speak in these optimistic terms of the Court's treatment of provincial law: "If it is created, it will be fit that its jurisdiction should extend to civil causes which might arise in the several Confederate Provinces, because it will necessarily be composed of the most eminent judges in the different provinces, of the jurists whose reputation stands highest, of men, in short profoundly skilled in the jurisprudence of each of the provinces which they will respectively represent."<sup>23</sup> But other Quebec delegates clearly did not share this high assessment of the future appeal court's qualifications for dealing with their province's civil law, especially the recently codified private law system of Lower Canada. Following Cauchon, both Antoine Dorion<sup>24</sup> and Henri Taschereau<sup>25</sup> expressed their hostility to the idea of a court composed predominantly of jurists from the English common-law tradition being vested with an appellate control over the French civil law of Lower Canada.

It must be emphatically stated that this point of view expressed by Cauchon, Dorion and Taschereau in the Confederation debates has remained to this day the classical objection of Quebec lawyers and jurists to the Supreme Court's appellate jurisdiction. It is the one

consistent note of French Canadian protest that recurs throughout almost a century of debate over the Canadian Supreme Court. While we must return to this theme at many stages in this study, there are three points in connection with it that should be noted here.

First, the antipathy to having the Civil Code of Lower Canada interpreted by judges from an alien legal tradition was not based merely on a concern for legal purity or accuracy. It stemmed more often from the more fundamental premise that Quebec's civil-law system was an essential ingredient of its distinctive culture and therefore it required, as a matter of *right*, judicial custodians imbued with the methods of jurisprudence and social values integral to that culture. There was some tendency at Confederation as there is now to argue that the distinctiveness of Quebec's private law could only be preserved by a dualistic judicial structure. Hector Langevin, the Solicitor-General for Canada East, put it this way in the Confederation Debates of 1865:

Again, we have at the present time as many systems of judicature as we have provinces; with Confederation, on the contrary, this defect will be removed, and there will be but two systems: one for Lower Canada, because our laws are different from those of the other provinces, because we are a separate people, and because we do not choose to have the laws of the other populations. . . . All the other provinces having the same laws, or their system of law being derived from one and the same source, may have one and the same system of judicature; and, in fact, a resolution of the Conference allows them to resolve that they will have one code and one judicial system.<sup>26</sup>

As the final point in Langevin's speech suggests, this policy of judicial dualism received some further constitutional support from Section 94 of the B.N.A. Act which omits Quebec from the uniformity both of laws and court procedure contemplated for the common-law provinces of Canada.

Secondly, the fact that Quebec's courts were already subordinate to the Privy Council took some of the sting out of the criticism of the Supreme Court's appellate jurisdiction. It was certainly in itself no innovation to subject the decisions of Lower Canadian judges on the French civil code to review by English common-law judges. But the attitude of Lower Canadian critics of the Supreme Court to the Privy Council was interesting. Some accepted the Privy Council appeal as an undesirable but unavoidable consequence of British imperial policy and looked forward to its eventual abolition.<sup>27</sup> But the more prevalent tendency was to compare the proposed Supreme Court unfavourably with the Privy Council and to look with considerable awe upon the cosmopolitan judicial talents represented on the latter tribunal. Members of the Judicial Committee, because of their classical legal education in the principles of Roman law, the affinity of their own law of equity to precepts of the French civil law, their alleged linguistic versatility and the fact that they were continually being called upon to hear appeals from the many diverse legal systems of the British colonies, were looked upon as being more capable of doing



justice to Quebec's laws than the collection of Canadian jurists who might man the Supreme Court. The opinion of Henri Taschereau that "Lower Canadians will assuredly be less satisfied with the decisions of a Federal Court of Appeals than with those of Her Majesty's Privy Council,"<sup>18</sup> was shared by many others from his province all through these early years of debate over the Supreme Court. It was only well after the establishment of the Supreme Court that Quebec jurists began to examine critically the effect of Privy Council decisions on their system of law.

Thirdly, the Lower Canadian opposition to appeals in matters of civil law from their provincial courts to a general Canadian appeal court touched the basic issue of the Supreme Court's relationship to Canada's federal structure. If the federal appeal court's appellate jurisdiction was to extend to both federal and provincial legal issues, then clearly there was to be no division of judicial authority paralleling the division of legislative power. On the contrary, the new federal state would have a unitary judicial structure. It was on this point that later in the debate over the establishment of the Supreme Court French Canadian critics would receive support from English-speaking federalists who demanded that judicial and legislative power in a federal state should be co-extensive.<sup>19</sup> But at Confederation this federal issue was barely raised and again perhaps the key reason for the lack of prominence given this point was the fact that under the appellate jurisdiction of the Privy Council Canadians would have, whether they liked it or not, a unitary judicial system.

## 2. Confederation to Supreme Court Act, 1875

The main subject of interest in this period is the reaction to the Macdonald government's plans to implement Section 101 of the B.N.A. Act.<sup>20</sup> Historians who have commented on this subject have explained Macdonald's abandonment of his Supreme Court Bills as largely the result of provincial rights opposition, especially by French Canadians, to the proposed Court's appellate jurisdiction in provincial law matters.<sup>21</sup> Macdonald himself, a decade later, referred to Quebec objections as "one of the great reasons" for his hesitating to enact legislation establishing a Supreme Court.<sup>22</sup>

Certainly the classical Quebec argument against a national appeal court's power to review the decisions of Quebec judges on civil-law issues was directed against the Supreme Court Bills of 1869 and 1870. It was pointed out to Macdonald that under his proposed court a Quebec suitor who won his case before the Superior Court, the Court of Review and the Court of Queen's Bench in Quebec only to lose, three to two, before the Supreme Court of Canada might, in such a situation, lose his case when 11 judges had been in his favour and only three against him.<sup>23</sup> This arithmetic was apt to look even less attractive when it appeared that only two out of seven judges on the Supreme Court would be from the Quebec bar or bench.<sup>24</sup> Even if these two judges predominated in Quebec appeals, given the fact that they would be reviewing the decisions of Quebec's five-judge Court of

Queen's Bench, this would mean, as one Quebec lawyer pointed out, that "two judges will thus be able to reverse the judgment of five judges as capable as they are themselves."<sup>35</sup>

This objection to the general appeal court's appellate jurisdiction was supported by considerable doubt as to Parliament's power under Section 101 of the B.N.A. Act to provide for appeals from provincial courts in matters subject to provincial legislative authority. A number of those who corresponded with Macdonald on his Supreme Court plans thought that only the provincial legislatures under Head 14 of Section 92, could give the right of appeal in matters subject to provincial jurisdiction.<sup>36</sup> But, it should be noted, Macdonald also received contrary advice. A memorandum prepared by G. W. Wicksteed summarizing opinions regarding the extent of Parliament's powers under Section 101 concluded that the presence of the phrase "notwithstanding anything in this Act" in Section 101 meant that Parliament's power to define the jurisdiction of a general court of appeal could override any powers which the Act might elsewhere bestow on the provinces.<sup>37</sup> This constitutional debate over the provinces' power to confer or regulate a right of appeal to the Canadian Supreme Court continued throughout the whole period of the Supreme Court's establishment. The issue was not settled legally until 1908 when the Privy Council declared that if there was a conflict between Dominion and provincial legislation concerning appeals to the Supreme Court, the federal power was paramount.<sup>38</sup>

But the evidence suggests that during this period the provincial protest against the Supreme Court's review of decisions concerning provincial law was neither as prominent nor as decisive as discontent with the extensive original jurisdiction which was provided for in the first plans for the Court. As indicated above, Macdonald's 1869 Bill gave the Supreme Court an original and in some instances, exclusive jurisdiction in all the significant areas of federal concern.<sup>39</sup> A memorandum prepared for Macdonald reported the reactions of some of his associates to the possibility of setting up the "additional Courts" referred to in Section 101 for the administration of federal laws.<sup>40</sup> All this pointed to a federal judiciary nearly as extensive as the federal courts of the United States.<sup>41</sup>

There was a vigorous outcry against these plans. Resentment was by no means confined to Quebec. The Barristers' Society of New Brunswick formally moved a vote of protest against the original jurisdiction proposed for the Supreme Court. This protest was supported by the province's Chief Justice Ritchie and Judge Weldon.<sup>42</sup> In the replies Macdonald received to his circular letter to the provincial judges soliciting their opinions on the Supreme Court Bill, resentment of the Court's original jurisdiction was the criticism most frequently expressed. Most of this criticism was based on the view that, given what at that time appeared to be the overriding importance of federal legal matters, if a federal court or courts were given exclusive jurisdiction over most of these matters, they would in large part supersede the existing provincial courts, or if federal



courts were to exercise a concurrent jurisdiction with provincial courts in these areas, a great deal of confusion would result.

This protest against the original jurisdiction of the new Court was effective. Macdonald's second Supreme Court Bill, drafted in 1870, which, he explained, had been carefully revised in the light of suggestions and criticisms of the provincial judges, reduced the Court's original jurisdiction to cases involving Dominion revenue laws, extradition cases and government reference cases.<sup>43</sup> This severe restriction of the Supreme Court's original jurisdiction was, for the most part, carried over into the Supreme Court Act of 1875 and has become a permanent characteristic of that Court. Thus, the main result of these early efforts to implement Section 101 of the B.N.A. Act was not to reduce the appellate jurisdiction of a federal court of appeal over provincial laws but to shatter the possibility of establishing an extensive federal judiciary specializing in the adjudication of important federal issues.

## *B. Creation of the Supreme Court, 1875*

### *1. Main provisions*

The Supreme Court Bill introduced by the Mackenzie government in 1875 in its essentials followed the pattern of Macdonald's 1870 Bill. The Court's principal function was to be that of an appellate tribunal with broad powers of review over provincial courts. In civil cases an appeal would lie to the Supreme Court from all final judgments of the highest court of last resort in the province. The only limitation on Quebec appeals was a monetary one: there would be no right of appeal from that province if the matter in dispute was less than \$2,000.<sup>44</sup> There was also provision for appeals *per saltum* from the court of original jurisdiction if both parties consented.<sup>45</sup> In criminal cases and extradition cases the Bill provided for an appeal from the judgment of a provincial court affirming a conviction or refusing an application for habeas corpus whenever such a court was not unanimous.<sup>46</sup> The original jurisdiction of the Court was extremely curtailed. It was to have a concurrent jurisdiction with provincial courts to issue writs of habeas corpus.<sup>47</sup> Also it was to function as an exchequer court with original jurisdiction in cases concerning federal revenue laws or the Dominion Crown as a party.<sup>48</sup>

Two changes in the 1875 scheme from Macdonald's earlier proposals call for some comment. First, the number of judges was reduced from seven to six with five constituting a quorum for most purposes.<sup>49</sup> The only explanation offered by Télesphore Fournier, the Minister of Justice and chief government spokesman for the Bill, was based on the size of Canada's population. Since six judges had been sufficient for the United States Supreme Court when it was first established at which time the American population was about the same size as Canada's in 1875, Fournier concluded that six judges would be enough for the Canadian Supreme Court.<sup>50</sup> Perhaps the more plausible explanation of the adoption of a six-judge court (which created the obvious

problem of the even number of judges producing tie votes) is that this number would make it possible for the Court to have precisely that pattern of regional representation—two judges from Ontario, two from Quebec, and two from the Maritimes—suggested by Macdonald in 1870. The first set of appointments to the Court certainly conformed to this pattern. And, indeed, with the new Western provinces sharing the Maritime places, this pattern, with only two short exceptions, was consistently followed for more than 50 years until a seventh judge was added to the Court in 1927.<sup>51</sup>

The second major change in the 1875 Bill concerned the special provisions for the Supreme Court's adjudication of important federal disputes. It is clear that both Macdonald and the Mackenzie government wanted the Supreme Court to have an exclusive jurisdiction in cases involving the interpretation of the B.N.A. Act. In this one area there was not only an unwillingness to abandon the American system of vesting in federal courts original jurisdiction in federal matters, but also an intention to go beyond this and prevent constitutional questions from being reviewed in provincial courts before coming to the federal Supreme Court. What prompted this intention was, above all, the desire to keep provincial legislatures from violating the terms of the B.N.A. Act. Indeed, as far as Macdonald was concerned, he does not seem to have believed in the propriety of permitting the Court through judicial review to invalidate Acts of the federal Parliament.<sup>52</sup>

But Macdonald had come to doubt that Parliament had the power under the B.N.A. Act to confer original jurisdiction in constitutional matters on the Supreme Court. Consequently in his second Bill he relied completely on the device of the federal government's submission of constitutional questions to the Court. The Court's answer to such questions would lack the status of legal judgments and thus not violate any constitutional bar to original federal jurisdiction in this area. At the same time as advisory opinions they might have a "moral effect" on the provinces and provide sound guidance to the federal government in exercising its powers of disallowance.<sup>53</sup>

The Liberal sponsors of the 1875 Act obviously shared Macdonald's doubts as to Parliament's power to vest an exclusive or original jurisdiction in constitutional matters in the Supreme Court.<sup>54</sup> But they adopted a more elaborate and, at first glance, bolder expedient for circumventing this problem. They retained the provision for eliciting advisory opinions from the Court, except that they left out any specific reference to constitutional questions so that this Section of the Act vaguely applied to "any matters whatsoever."<sup>55</sup> But for intergovernmental disputes and constitutional issues a special Supreme Court jurisdiction was established.<sup>56</sup> First, controversies between the Dominion and a province or between two or more provinces were to be brought to the Exchequer Court with an appeal to the Supreme Court and secondly, questions concerning the constitutional validity of Dominion or provincial laws which came up in the course of civil cases in the lower courts were to be removed to the Supreme Court for its decision.

These provisions of the Act were passed with virtually no opposition. One key reason for this is that their coming into force for any province was conditional on the provincial legislature's passing enabling legislation. But even when this is taken into account it is surprising that more attention was not given to the qualifications of the Supreme Court for the crucial function of judicial review. That this function was recognized as crucial, at least in relation to provincial legislation, was evident from the remarks of members on both sides of the House. They pointed out that the uncertainty caused by the growing number of provincial laws suspected of being *ultra vires* created a paramount need for the establishment of a Supreme Court.<sup>57</sup> But the view of classical federalists or of Quebec spokesmen that the court which "umpires" the federal system should not be solely staffed by central government appointees was not expressed throughout the debate on the Supreme Court Act.

Probably more important than the substantive changes in the 1875 Act was the difference in its sponsors' attitude to Privy Council appeals. Fournier, in his speech on first reading, asserted his government's desire eventually to have no appeal from the Supreme Court to the Judicial Committee—although he was willing to set this issue aside until the re-organization of the British judicial system, which was then in process, had been completed.<sup>58</sup> The Liberals' desire to abolish Privy Council appeals and their later acceptance of an amendment which would at least cut off statutory appeals from the Supreme Court provoked the only serious criticism from the official opposition during the debate on the Supreme Court Act. On the other hand, the possibility of the Supreme Court becoming a final court of appeal gave government spokesmen some further grounds, in terms of both convenience and the advantages of an indigenous jurisprudence, for defending the appellate jurisdiction of the new Court.

## 2. *The main points of controversy*

There were two principal points of controversy in the debate which took place in 1875 over the creation of the Supreme Court: the argument against the Court's appellate jurisdiction in provincial law matters, and opposition to the prospect of abolishing appeals to the Privy Council. Of these, the latter issue provoked the sharpest reaction from Macdonald and most of his party followers. But the issue did not come to a head until nearly the end of the debate when Aemilius Irving moved his famous amendment, and then there was considerable misunderstanding on both sides as to its real implications.<sup>59</sup> On the other hand hostility to the Supreme Court's review of provincial court decisions, especially the decisions of Quebec courts dealing with Quebec's Civil Code, ran throughout the debate and was the central theme of most French Canadian criticism of the Act.

For the most part, this protest against the Supreme Court's appellate jurisdiction in legal matters subject to the exclusive legislative jurisdiction of the provinces took the "classical" form. There was still some feeling that the vesting of this jurisdiction in



the Supreme Court by Parliament violated the constitutional rights of the provinces. But most often criticism was focused on the policy of "submitting the laws relating to property, to civil rights and civil procedure in the Province of Quebec . . . to judges, who, for the most part are strangers to their language, their manners, their usages. . . ." <sup>60</sup> As in the reaction to the Macdonald Bills the main point of attack was the apparently unjust arithmetic involved in permitting a federal court with no more than two members trained in Quebec's civil law to review the decisions of five or more Quebec appeal court judges all of whom were legally required to be qualified practitioners in this system. <sup>61</sup>

Even some of the most prominent Quebec supporters of the Supreme Court Act had reservations about allowing the Supreme Court to reverse Quebec courts in civil-law matters. T.A.R. Laflamme, for instance, who was otherwise a strong advocate of a national Supreme Court, proposed an amendment which would forbid appeals to the Supreme Court in all private law cases from Quebec (excluding commercial law cases) in which two Quebec courts had been unanimous. <sup>62</sup> Sir Wilfrid Laurier supported a rather similar amendment. <sup>63</sup> On the Conservative side, Langlois, who also favoured the establishment of a Supreme Court, argued that the common-law judges would be inclined to defer to the opinions of the two Quebec judges in cases involving the French civil law. To cover instances in which this failed to happen, and the common-law judges out-voted their civilian brethren, he advocated an amendment requiring the Quebec court's decision to stand confirmed on such cases. <sup>64</sup> Others who were not so favourably disposed towards the general plan for the Supreme Court wanted to go much farther and eliminate all appeals to the Court in provincial law matters. <sup>65</sup>

None of these proposals was accepted by the government. The only concession made to this general point of view was the adoption of Laflamme's amendment requiring that two of the six Supreme Court judges be members of the Quebec bar or bench. <sup>66</sup>

It should be noted that this particular kind of concern about the Supreme Court's appellate jurisdiction was almost entirely confined to French Canadian representatives of Quebec. <sup>67</sup> The one point on which this line of criticism was able to enlist support from English Canadians was where it linked up with a concern for "pure" federalism. David Mills was by far the most vigorous exponent of the latter view, insisting that in a federal state legislative and judicial power should be co-extensive. <sup>68</sup> But Mills was nearly alone in this anxiety to maintain a division of judicial authority parallel to the division of legislative powers. The French Canadians showed no inclination to couch their criticism of the Supreme Court's appellate jurisdiction in federalist terms. On the whole, the rationale of their case turned much more on an interest in preserving their own culture than on the logic of federalism. And, on the English Canadian side, while there were numerous critics of the Supreme Court proposal, their attack concentrated far more on the unnecessary expense that an

additional Canadian appeal court might impose on both the government and litigants, than on alleged violations of the canons of federalism.<sup>69</sup>

Of course the government was not without some means of answering these criticisms of its Supreme Court proposal. Indeed, in replying to the main French Canadian criticism, Fournier and the Liberals had one rejoinder which was never available to Macdonald. That was the possibility of terminating appeals to the Privy Council. By at least looking upon this as both a real and an attractive possibility, they could proclaim the advantages, from Quebec's point of view, of having as a final court of appeal a tribunal on which there were at least two members of the Quebec bench or bar as opposed to one on which there were none. Of course, Fournier and those who shared his enthusiasm for the abolition of Privy Council appeals conceded that they could not touch the right of appeal from provincial courts to the Privy Council.<sup>70</sup> But even so, by making the Supreme Court's decision final in cases referred to it, the litigant who wished to contest the decision of a provincial court would be given the option of appealing either to the Privy Council or to the Supreme Court. Fournier, Laflamme, and others argued that the Supreme Court would be much the more attractive alternative, not only because of the presence on its bench of Quebec jurists but also because it would be much less expensive.<sup>71</sup> Reference was also made to the Judicial Committee's jurisprudence, pointing out how their lordships had not hesitated to reverse a unanimous decision of the Quebec courts in French civil law, and to the difficulties which Canadian lawyers experienced in Privy Council practice. Laflamme, who was later to turn down an invitation to serve as a puisne judge on the Supreme Court, embellished all these arguments with a spirited appeal to Canadian nationalism in a speech which would have done justice to Edward Blake: "We are preparing for the future. We have formed laws which meet our wants and which suit our peculiar circumstances, and those laws were not and could not be the same as those of England; and on a question of interpretation, the judicial atmosphere in which the English Judges lived was different from that in which dwelt the Judges who were born and brought up in Canada and were acquainted with the wants of this country."<sup>72</sup> Some French Canadians would have pushed this argument further and argued that for the provinces the only way to establish a truly indigenous judiciary would be to make the provincial appeal courts the final courts of appeal in provincial law matters.<sup>73</sup>

But there were others from Quebec who favoured the retention of Canadian appeals to the Privy Council: Baby and Mousseau, both of whom were strongly opposed to the Supreme Court's review of civil-law cases from Quebec, expressed great confidence in the Privy Council as Quebec's final appellate court. Baby thought that a Canadian general appeal court would compare unfavourably with the Judicial Committee which was composed of men "acquainted, in general, with the English and French languages, as also with the laws and institutions of

England and France. . . ."74 Mousseau contended that the Privy Council would be a much better protector of Quebec's rights than the Supreme Court was likely to be.<sup>75</sup>

One important point to keep in mind in explaining this Quebec support for the retention of appeals to the Privy Council is the widespread dissatisfaction with that province's judiciary which existed throughout this period. In 1868 wholesale charges were made by Quebec M.P.'s against the Quebec judiciary, accusing many of the judges of incompetency. One member concluded his contribution to the 1868 debate by stating that "the administration of justice in Lower Canada had never been in such a wretched condition as at present."<sup>76</sup> In 1873 this discontent became critical when members of the Montreal bar refused to appear before the Court of Queen's Bench until certain reforms were made.<sup>77</sup> Under these circumstances it is not surprising that the opportunity to appeal from Quebec courts to the Privy Council should have special attractions to some Quebec lawyers and litigants.<sup>78</sup> Some evidence of this attraction can be found in the fact that between Confederation and the establishment of the Supreme Court far more appeals were made from Quebec to the Privy Council than from any other province.<sup>79</sup> It was, of course, possible to interpret this phenomenon in a rather different way, as did Justice Minister Fournier. "The right of appeal," he said, "had been rather extensively used, and . . . considerably abused in the Province of Quebec, by wealthy men and wealthy corporations to force suitors to compromise in cases in which they had succeeded in all the tribunals of the country."<sup>80</sup>

At least this much is clear about the abolition of Privy Council appeals: the division of opinion on this issue, compared with the controversy over the Supreme Court's appellate jurisdiction, did not fall along French-English lines. The main lines of division were those of party and here the desire of Macdonald's Conservatives to retain the appeal to the Privy Council was based primarily on their concern for preserving Canada's links with the Empire. At this moment of the Supreme Court's birth the contention that a Canadian Supreme Court would be a less objective, and therefore a less effective judicial arbiter of Canada's federal system than the more dispassionate Judicial Committee sitting across the sea, was not heard. It remained for British authorities to develop this particular justification for the perpetual subservience of the Canadian Supreme Court to the Privy Council.<sup>81</sup>

Although Clause 47 making the Supreme Court's judgments final in all but special "prerogative" appeals to the Privy Council was incorporated into the Supreme Court Act in 1875, within a year of the passage of the Act it became clear that this clause was in effect a dead letter. Those Canadians who had been concerned with drafting and debating the clause had assumed a distinction between the legal status of appeals which depended on the special exercise of the Royal prerogative and the status of those which were part of the regular administration of justice provided by imperial statutes. It was thought that Clause 47 kept only the former intact. This distinction



was, however, rejected by Lord Cairns, the English Lord Chancellor at the time. Cairns' view that, "the appeal to the Sovereign in Council is one and indivisible,"<sup>82</sup> was eventually accepted as correct by Edward Blake, the Canadian Minister of Justice. Consequently, even though the imperial government agreed not to disallow Clause 47, this was a hollow victory for Canadian judicial nationalism, for it was accepted by then, on both sides, that Clause 47 left the appeal to the Privy Council unchanged.<sup>83</sup>

### *C. The Supreme Court under Attack*

Throughout the first three decades of its existence the Supreme Court was constantly under attack by both politicians and lawyers. In references to the Court in the law journals and legislative debates of these years, one finds that the Court was almost always the object of criticism, and rarely, if ever, the recipient of praise. Even those who believed in a Canadian Supreme Court as an indispensable element in the institutional fabric of the Canadian federation had to acknowledge, in their defence of the Court, that it had not, as yet, been a complete success and that it was necessary to search for ways of strengthening it.<sup>84</sup> Their speeches, when read today, seem to damn with faint praise. On the other hand criticism of the Court by those who were not convinced of the inherent necessity for a Canadian general court of appeal was quite unreserved and mounted at times to derision. This criticism is all the more remarkable when we bear in mind the conventional inhibitions against expressing unfavourable opinions of judicial tribunals.

#### *1. Political motives*

The initial attack on the Supreme Court was prompted largely by political motives. In 1875 the Court had become a step-child of Alexander Mackenzie's Liberal administration. Before this, when Sir John A. Macdonald was the Court's chief proponent, we know that he encountered a great deal of hostility to the Court within his own party, especially from its Quebec wing. Now this opposition came into the open. A number of Quebec Conservatives tried to turn Liberal sponsorship of the Court to their own political advantage. They tried to impress their provincial constituents with their leader's restraint, in contrast to the Liberal's speed, in pushing through a Supreme Court Act. During the 1878 federal election the Court appears to have been a factor of considerable importance in some constituencies.<sup>85</sup> A number of M.P.'s were returned with a mandate either to abolish the Supreme Court or drastically to curtail its appellate jurisdiction.<sup>86</sup> And although Macdonald was too committed to the Supreme Court to abandon it when he returned to power in 1878, he was sensitive enough to the Court's unpopularity to promise to consider bringing in remedial measures.

Nor did the Liberal government's first appointments to the Court do much to alleviate political pressures on the Court. Three of the

first six judges came with very respectable judicial credentials. Richards, the first Chief Justice, had been Chief Justice of Ontario, Ritchie was Chief Justice of New Brunswick, and Strong, the other Ontario appointee, had for many years been a judge on the Ontario Court of Error and Appeal. But the other three appointments were far less impressive and suggested that with the Liberal government, as with all of its successors, political connection rather than professional achievement would be a necessary, if not a sufficient, condition for receiving some of its appointments to the Supreme Court bench. Fournier had been a leading Liberal politician, serving in Mackenzie's cabinet as Minister of Justice, Postmaster General, and Minister of Inland Revenue. Henry had long been prominent in Nova Scotia politics and was a leading figure in the Confederation movement. Although something of a political maverick, he had spent 16 years in the ranks of the Liberal party. As for his professional qualifications, all that the editor of the *Canada Law Journal* could say, reviewing his appointment, was, "Mr. Henry from Nova Scotia is said to be a fair lawyer."<sup>87</sup> Finally, Jean-Thomas Taschereau, the other Quebec judge, while not himself a politician, did belong to a family which certainly enjoyed close links to the Liberal party. His son, Henri-Thomas, a federal Liberal M.P., was later appointed to the Superior Court in Quebec. When the elder Taschereau was forced by ill health to resign from the Supreme Court, he was replaced by his cousin, Henri-Elzéar Taschereau. Both of these latter appointments—"this little family stir" as Auguste Landry, a Conservative M.P., referred to them—took place in the last days of the Liberal administration in the fall of 1878 and inevitably were interpreted as being politically motivated.<sup>88</sup>

## 2. Professional criticism

But while political interests certainly had something to do with the initial agitation over the Supreme Court it could not be said that they were a major determinant of the prolonged discontent with the Court. This dissatisfaction was expressed for many years after the Court as an institution or members of its bench, could be linked politically with the party which had brought the Court into being. The explanation of this dissatisfaction must be based on substantial grievances with the Court's effect on the administration of justice in Canada.

These grievances were pretty well confined to Quebec and Ontario legal circles. Since neither the Maritimes nor the new Western provinces had established specialized courts of appeal, their representatives could not follow Ontario and Quebec lawyers in their unfavourable comparison of the Supreme Court with their own provincial appeal courts. On the contrary they were inclined to welcome the Court as a far more accessible and inexpensive alternative appellate court to the Privy Council. With very few exceptions, Maritime M.P.'s spoke favourably of the Supreme Court.<sup>89</sup> The only serious note of dissent voiced by Western spokesmen concerned the lack of Western representation on the Supreme Court bench.<sup>90</sup>

While the attack on the Supreme Court was launched primarily by English-speaking Ontarians and French-speaking Quebecers these two groups based their respective critiques on quite different factors. The Quebec viewpoint emphasized the now familiar French Canadian complaint that their French civil law ought not to be interpreted by a Canadian court whose members were predominantly Anglo-Saxon common-law judges. The Ontario critics, on the other hand, concentrated their fire on alleged inadequacies of the Court's procedures and personnel. Their main concern was not that the Supreme Court would dilute the purity of Ontario law but that from a purely technical point of view it would be of inferior quality to either the Ontario Court of Appeal or the Judicial Committee of the Privy Council. Only very occasionally did they verge towards the French Canadian type of criticism and object to a Court which had only two Ontario judges reviewing the decisions made by a larger number of highly qualified members of the Ontario judiciary.<sup>91</sup>

Most often Ontario disparagement of the Supreme Court was based less on the view that some of its members lacked a specialized knowledge of Ontario legal traditions than on the allegation that, on the whole, its membership was not as well qualified professionally to deal with general common-law and equity issues as were the more experienced and more active members of the Ontario bench.<sup>92</sup> Ontario had only recently reorganized and strengthened its own provincial appeal court, with the result that many lawyers from that province could see no need to subject the decisions of the newly established Ontario Court of Appeals to review by another Canadian appeal court. While all of the Ontario appointments to the Court up until 1902 went to highly respected Ontario judges, appointments from other provinces did not always inspire the same confidence.<sup>93</sup> This lack of confidence was intensified by the feeling that the Court's location in Ottawa would prevent its members from having much contact with the country's best lawyers and jurists who tended to congregate in large cities like Toronto and Montreal.<sup>94</sup> Many thought that the lack of such contacts coupled with the relatively light work load which was predicted for the Court could not help but have very adverse effects on the quality of its jurisprudence.

In 1879 when Joseph Keeler, an Ontario M.P., launched the first parliamentary assault on the Supreme Court by moving first reading of a Bill to abolish the Court, these sentiments were freely expressed in the debate which was allowed to ensue.<sup>95</sup> Keeler, a non-lawyer, expressed the layman's interest in avoiding the cost of an additional appeal and the upkeep of an unnecessary appeal court. But his Bill also gave such prominent members of the Ontario bar, as D'Alton McCarthy and Hector Cameron, an opportunity to record their professional doubts about the Court's merits. In the years following 1879, as lawyers watched the Court at work, their initial doubts were reinforced by objections to certain characteristics of the new Court's behaviour.

Some of these complaints were directed against rather minor points such as the undue delays in bringing down judgment, the form of the



Court's reports, and the inconvenience of the dates fixed for its sittings. But a more serious source of dissatisfaction was the obvious lack of harmony on the Court's bench. The animosity and disrespect which some of the Court's first judges felt for each other were publicly displayed on a number of occasions and did much to undermine professional respect for the Court.<sup>96</sup> But, in the long run, the lack of coherence and collaboration in the Court's decision-making system was even more detrimental to its prestige. From its inception there was little or no attempt through judicial management or consultation to reduce the differences between different points of view so as to produce a majority opinion. On the contrary in some of the most important and contentious cases each judge wrote a separate opinion in which he expressed his views on many different aspects of the case. As a result many lawyers shared the views of the editor of the *Canada Law Journal* who complained in 1880 that "the main difficulty that meets one in considering some of the judgments of the Supreme Court, is upon what grounds does the judgment of the Court rest—what is and what is not extra-judicial in each particular judgment—and in the united result which forms the decision of the Court?"<sup>97</sup> The publication of dissenting opinions was bad enough for those accustomed to the unanimity of the Privy Council's "advice" to the throne, but the failure of the Court to identify clearly the *ratio decidendi* of its majority was then and has remained a source of confusion and hence dissatisfaction to many Canadian lawyers.<sup>98</sup>

These rather professional and technical objections to the Court continued to be expressed for several decades, but after 1879 they did not spark as intense an outcry against the Court as the more cultural demands of the Court's French Canadian critics. Whereas in 1879, the debate on Keeler's Bill to abolish the Supreme Court was almost entirely an Ontario affair, a year later when Keeler introduced the same Bill, most of his support came from Quebec Members. In 1881, following Keeler's death, Auguste Landry took over the sponsorship of his abolition Bill. In the same year, Désiré Girouard, who in 1895 was to accept an appointment to the Supreme Court, brought in a Bill to eliminate the Supreme Court's jurisdiction in matters within the exclusive legislative jurisdiction of the provinces. Landry was back again in 1882 with his Supreme Court Repeal Bill and although he and his French Canadian supporters apparently gave up the possibility of abolishing the Court completely, for four successive years, from 1883 to 1886, they brought forward measures like Girouard's designed to terminate appeals to the Supreme Court in provincial law matters.

The main theme sustaining all these efforts was the classical objection of French-speaking Quebecers to the Supreme Court's appellate supervision of their Civil Code.<sup>99</sup> At the beginning of his speech on the 1881 abolition Bill, Landry asserted that the Supreme Court was fast fulfilling the worst fears of the French Canadians. "We see," he said, "every day judgments of the Court of Queen's Bench, Court of Appeals and other Courts, revised by, practically, two Judges of the Supreme Court, only two knowing our civil law and their colleagues being obliged to accept their advice and opinions. So the

judgments of five Judges in our Superior Courts are liable to be set aside by only two Supreme Court Judges, and when the two Judges do not agree, such judgments are really reversed by only one of them. . . ."100 Rarely was a particular case cited as evidence of the deleterious effects which this appeal system could have on Quebec's Civil Code.<sup>101</sup> But almost all of those who joined Landry's campaign were convinced that, as a matter of *principle*, it was wrong to subject their distinctive private law to review by such an "alien" tribunal.

The one new ingredient which was not added to this traditional complaint was the Court's alleged linguistic inadequacies. In the 1880's the allegation that French-speaking lawyers were under a serious handicap when they appeared before the Court was heard almost as often as accusations of its incompetency in dealing with Quebec's private law. M. J. Coursol, a lawyer and ex-judge from Montreal East, in 1881 claimed that ". . . it is next to impossible for French Canadian lawyers, not fully acquainted with the English language, to appear before that tribunal, only two of whose members can speak French."<sup>102</sup> Others like Joseph Tassé, a French-speaking lawyer from Ottawa, argued that these practical obstacles to speaking French before the Supreme Court were "contrary to the spirit of our Constitution which places the two languages on the same footing."<sup>103</sup>

This protest against the Court's low facility in the French language was not unrelated to the anxiety over its effects on Quebec's jurisprudence. Quebec jurists often argued that no one could achieve a high level of competency in understanding Quebec's French civil law without being able to read and comprehend French jurisprudence.<sup>104</sup> Finally, it should be noted that many Quebec lawyers at this stage held a more favourable opinion of the Privy Council's capacity for dealing adequately with Quebec appeals. This was not only because, as Mousseau claimed, "there they could argue their cases in their own language,"<sup>105</sup> but also because, to quote Girouard, "the members of the Privy Council, are all men versed in French law, they speak fluently the language of the French jurists, and can consult and study their opinions, without being reduced to the painful necessity of having translations made for them, as had often been done for the Judges of the Supreme Court."<sup>106</sup>

The response of the Court's supporters to these charges was not particularly strong. Those who took up the language issue were inclined to deny that there was any need for a truly bilingual Court. The Prime Minister, Sir John A. Macdonald, in replying to Tassé's complaint about the Court's inability to hear cases in French, dismissed this point as irrelevant on the grounds that "all the counsel of Lower Canada who have really attained any position in the profession can speak English just as well as my honourable friend."<sup>107</sup> There were also those who dismissed the accusations levelled against the Court's bicultural inadequacies by arguing that French Canadian critics over-emphasized the differences between the French civil law and the English common law and that, in any event, "every English-speaking judge who sits on that bench has made a study of the Civil law."<sup>108</sup>

But, at least at the outset, the Macdonald government appeared prepared to give serious treatment to Quebec's objections to the Supreme Court's adjudication of civil-law matters and to look for some way of appeasing those who expressed objections. The only concrete proposal which this concern produced was a Bill introduced in the Senate by Alexander Campbell, the Minister of Justice, in 1882. This legislation would have applied only to Quebec appeals dealing with "laws which are peculiar to the province of Quebec." For hearing these cases it would have added to the Supreme Court two judges selected from a panel of Quebec superior court judges.<sup>109</sup> There were many practical objections to this measure, not the least of which was the disrupting effect it was likely to have on the Quebec judiciary, and the Bill was soon withdrawn. Macdonald later admitted that he had also considered adding civilian jurists to the Supreme Court on a permanent basis but had ruled this out because it might increase the chances of having the common-law judges out-voted by the Quebec judges on common-law issues. To back up this fear he claimed that already the actual voting pattern on the Court was developing in a direction exactly opposite to that predicted by the Court's Quebec critics: "I am told that there are few, if any, cases in which the decided opinion and deliberate judgment of the two judges coming from the Province of Quebec, have been overruled by the other judges; but I am told also that it is found that frequently the judges from the Province of Quebec have joined with the minority of the other judges of the Supreme Court, and have overruled the decision of the majority of the English judges."<sup>110</sup> Whether or not this was the decisive factor in shaping Macdonald's policy on this matter, it is clear that his government made no further attempts to meet the Quebec demands for Supreme Court reform.

It is remarkable that the controversy which revolved around the Supreme Court during these years was not more concerned with the Court's impact on Canada's federal structure. Those from Quebec who demanded the abolition of appeals to the Supreme Court in provincial law matters continued to base their case, not on the federal principle of having a division of judicial authority parallel to the division of legislative power, but rather on the special requirements of Quebec's legal culture. All of them emphasized that it was only Quebec which they insisted should be given the opportunity to opt out of the Supreme Court's appellate jurisdiction over vital areas of provincial law. Moreover, there was surprisingly little awareness of the extent to which the Supreme Court's first appointees tended to take a centralist position in interpreting the B.N.A. Act.<sup>111</sup> To his basic indictment of the Supreme Court, Landry added the charge "that all our provincial rights have been impaired by the judgements of this Court."<sup>112</sup> But aside from a few rather vague allusions such as this there was no direct attack by provincial rights advocates on the Supreme Court's constitutional law decisions.

Neither the controversy over the Court's appellate jurisdiction, nor its adjudication of constitutional issues made it an important issue in Dominion-provincial affairs during this period. At the



Interprovincial Conference of 1887, which climaxed the provincial rights agitation of the post-Confederation years, there were no provincial demands for abolition or reform of the Supreme Court. Indeed the Resolution which the Conference passed calling for "equal facilities to the Federal and Provincial Governments for promptly obtaining a judicial determination respecting the validity of Statutes of both the Federal Parliament and the Provincial Legislatures" went on to say that "any decision should be subject to appeal as in other cases, in order that the adjudication may be final."<sup>113</sup> No mention was made of the advantages or disadvantages of having such cases appealed to the Supreme Court of Canada.

This early series of attacks on the Supreme Court had little to do with the Court's actual decisions either as they affected provincial rights or Quebec's Civil Code. The case which probably excited the sharpest feelings of hostility in Quebec was *Brassard et al. v. Langevin*.<sup>114</sup> But this case was concerned neither with Quebec's civil law nor the division of legislative powers under the B.N.A. Act. The central issue was whether certain sermons and threats made by parish priests urging their parishioners to vote for the Conservative party candidate, Hector Langevin, in an 1876 bi-election, amounted to acts of undue influence in contravention of the Dominion Elections Act. The Supreme Court upheld the charge and ruled that Langevin's election was void. This judgment at the time undoubtedly ran directly counter to the prevailing sentiments of the Roman Catholic Church in Quebec. But it is worth noting not only that the Court, which included two French Roman Catholic judges, was unanimous but also that it was one of those judges, Taschereau, who most clearly enunciated the view that the Church's conception of its obligation to direct the consciences of its members in political affairs must give way before the political value of "the free and sincere expression of public opinion in the choice of members of the Parliament of Canada."<sup>115</sup>

Nor could the Supreme Court's decisions affecting minority as distinguished from provincial rights be regarded as a source of serious discontent or disillusionment with its adjudication. In the 1890's the Court was called upon twice to decide extremely important constitutional questions related to the Manitoba Schools dispute. The case of *Barrett v. The City of Winnipeg*<sup>116</sup> in 1891 provided the first real test of the Court's treatment of the educational rights of religious denominations under Section 93 of the B.N.A. Act and Section 22 of the Manitoba Act. On this occasion the Court unanimously ruled that Manitoba legislation requiring Roman Catholics to pay taxes in support of secular public schools was *ultra vires*. In this case two Protestant Judges, Ritchie and Patterson, took the lead in reasoning that the Manitoba legislation, even though it left the Roman Catholics free to carry on their own denominational schools, in fact prejudiced their right to enjoy confessional education by making it necessary for them to pay two school charges. It is true that three years later the Supreme Court, in a three-to-two decision, ruled that the Roman Catholic minority in Manitoba had no right to appeal to the Governor General in Council for relief from the

Manitoba Public Schools legislation.<sup>117</sup> But two members of the majority based their decision on the fact that the Privy Council in overruling the Supreme Court's decision in *Barrett v. The City of Winnipeg*, had found the Manitoba legislation valid and that this disposed of the matter. The Supreme Court's decision in this case was once again reversed by the Privy Council, a result which naturally met with great approval in French-speaking Roman Catholic circles in Canada.<sup>118</sup> Still, it would seem illogical to infer from this pair of decisions that the Supreme Court was a less trustworthy custodian of the educational rights of religious minorities than the Privy Council. As Professor Scott has pointed out, "If the Supreme Court had been the final court of appeal in this legal battle there would have been a complete victory for the minority claims, since the Manitoba Act would have been invalidated in the first place and therefore no appeal to the Dominion Government would have been necessary."<sup>119</sup>

In summing up this early period of discontent with the Supreme Court, it could be said that most of the attack from both French- and English-speaking quarters was based much more on the Court's anticipated performance than on its actual performance. French Canadian suspicion was governed by the view that a Canadian court with only two civilian lawyers among its six members must inevitably be less capable than Quebec's own appeal court or the learned and cosmopolitan English law-lords in interpreting Quebec's distinctive laws. English Canadian disrespect stemmed largely from professional doubts of the competency and indeed of the necessity of any appeal court which, in terms both of its personnel and location, was not at the centre of the common-law world.

#### *D. The Acceptance of the Supreme Court*

The Supreme Court survived this period of open public attack, but it survived in a very weakened condition. The Court had clearly failed in its first three decades to inspire a significant measure of enthusiasm or respect in the Canadian public generally and, least of all, in the country's legal profession. This failure does much to explain the postponement in Canada of any widespread agitation to abolish appeals to the Privy Council and make the Supreme Court Canada's final court of appeal. For these years during which the Supreme Court was the target of constant criticism were also the years in which imperial authorities took a number of steps to strengthen the Privy Council as the highest court of appeal for the Empire. As a result of judicial reforms introduced in Great Britain in the 1870's and 1880's the Judicial Committee had come to be composed "almost entirely of the most eminent Judges of the Empire."<sup>120</sup> By a series of imperial Acts, beginning in 1895, the principal judges of the Dominion courts were qualified to sit on the Committee. Although these changes in the composition of the Judicial Committee were unable in the long run to stem the tide of judicial nationalism in the

Dominions, for the time being they tended, in Canada, to reinforce the Supreme Court's subordination to the Privy Council.

### *1. Subordination to the Privy Council*

For the first half of the twentieth century, until the abolition of Privy Council appeals in 1949, the most important fact about the Supreme Court was simply its position of subordination to the Privy Council in the Canadian judicial hierarchy. It was this subordination which, more than anything else, explains the cessation of serious public criticism of the Supreme Court. Once Canadians had come to realize the full significance of Dicey's dictum that the Privy Council was "the true Supreme Court of the Dominion,"<sup>121</sup> their critical attention was naturally directed to the Judicial Committee rather than to the Supreme Court. And in the end, when the movement to abolish appeals to the Privy Council was finally successful, its success was based far more on discontent with the Privy Council than on admiration for the Supreme Court of Canada.

The Supreme Court was subordinate to the Privy Council in three different ways. In the first place, and most obviously, the Judicial Committee still had the power to review the Supreme Court's decisions. As we have noted, the Canadian government's efforts to terminate appeals in 1875-6 had been abortive, leaving intact the prerogative right of appeal. Thus, although Canadian legislation did not grant a right to appeal any of the Supreme Court's decisions to the Privy Council, dissatisfied litigants were still free to petition the Privy Council for special leave to appeal from a Supreme Court judgment. In granting leave to appeal, the Privy Council stated that it would be guided by the following principles: "Their Lordships are not prepared to advise Her Majesty to exercise her prerogative by admitting an appeal to Her Majesty in Council from the Supreme Court of the Dominion, save where the case is of gravity involving matter of public interest or some important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance or of a very substantial character."<sup>122</sup> The Judicial Committee also indicated that when the party requesting leave to appeal had voluntarily resorted to the Supreme Court it would expect an even stronger case for appeal to be made out.<sup>123</sup> But even so, this effort to confine appeals to the most important cases hardly diminished the Supreme Court's inferiority to the Privy Council.

Secondly, it was possible in many instances for Canadian litigants to by-pass the Supreme Court altogether and to appeal from a provincial court directly to the Judicial Committee. The right of appeal from the Supreme Court of each province to the Privy Council was much larger than that which lay from the Supreme Court of Canada. In addition to the special grant of leave to appeal by the Privy Council itself, legislation or orders-in-council had established in each province an automatic right to appeal in cases meeting certain conditions.<sup>124</sup> Also in some provinces there was provision for provincial



courts to grant leave to appeal. In 1938 the Minister of Justice informed the House of Commons that appeals to the Privy Council from provincial courts since 1867 had outnumbered appeals from the Supreme Court by 329 to 198.<sup>125</sup> A great many of these appeals from provincial courts involved important constitutional questions,<sup>126</sup> so that very often the Supreme Court had no opportunity to adjudicate the most significant disputes affecting Canada's federal structure or the rights of minorities.<sup>127</sup>

Finally, the most significant and most enduring form of subordination was that which stemmed from the Supreme Court's adherence to the principle of *stare decisis*. At a minimum, *stare decisis* meant that the Supreme Court like all other Canadian courts considered itself bound by the decisions of the highest court of appeal, the Privy Council. This rule had particular significance in the area of constitutional law, for here the Privy Council did not recognize the authority of any higher tribunal. But beyond this, in non-constitutional matters, the Privy Council considered itself bound by the decisions of the House of Lords, the United Kingdom's ultimate appeal court. This fact compelled Canadian courts, including the Supreme Court, either by the force of logic or tradition, to consider themselves bound to follow the decisions of the House of Lords and of English courts of higher or co-ordinate jurisdiction.<sup>128</sup> Indeed the Supreme Court seemed even more reluctant than some of the provincial appeal courts to depart from English precedents.<sup>129</sup> The real effect of this complete subjection of the Supreme Court's jurisprudence to the authority of English decisions was to sap the Court's initiative for developing its own distinctive solutions to Canadian legal problems. Professor Laskin, one of the best qualified students of the Court's record, looking back over the Court's performance up to the abolition of Privy Council appeals concluded that, "It has far too long been a captive court so that it is difficult, indeed, to ascribe any body of doctrine to it which is distinctively its own, save, perhaps, in the field of criminal law."<sup>130</sup>

The first two forms of subordination meant that the Supreme Court was completely eclipsed by the Privy Council as the controlling Canadian court of appeal. Both these aspects of subordination were completely removed in 1949 when the Supreme Court of Canada became the final appellate court for all Canadian courts. The third element of subordination, however, was not so easily overcome. Although there seems to be little doubt that, following the abolition of Privy Council appeals, the Supreme Court was under no legal compulsion to follow the decisions of the Privy Council and the House of Lords, the Supreme Court did not rush to exercise the full measure of its newly acquired autonomy.<sup>131</sup> A considerable body of professional legal opinion in English-speaking Canada urged the Supreme Court to become far less rigid in its application of *stare decisis* to both the decisions of English courts, and to its own decisions. But the Court has not in any deliberate way shown that it is willing to follow this advice. Thus, any assessment of the influence of the Supreme Court's decisions on Canadian jurisprudence must bear in mind the extent of

the Court's deference—past and present—to English decisions. Where the Court considers itself bound by these decisions, it will be its policy of *stare decisis* which is the most important determinant of its impact on Canadian law and society.

## 2. *The evolution of Canadian attitudes to legal dualism in the Supreme Court*

The twentieth century witnessed a great increase in understanding on the part of both French- and English-speaking Canadians of some of the real implications of living in a country in which the two major traditions of Western law, the English common law and the continental civil law, operate side by side. This more sophisticated and more self-conscious awareness of the problems and possibilities of legal biculturalism influenced Canadian attitudes not only to their legal systems generally, but in particular, to the Supreme Court as a common appellate court for both the common-law and civil-law provinces.

After the turn of the century the loud political protest of Quebec representatives against the Supreme Court's review of Quebec court decisions in civil-law matters virtually died out. There was one final outburst of this feeling in 1903 when L. P. Demers' Bill to limit the Supreme Court's jurisdiction to federal law matters reached the second-reading stage.<sup>132</sup> On this occasion one Quebec lawyer went so far as to claim that, because of the Court's incompetence in civil law, Quebec lawyers were anxious to avoid having cases appealed to it: ". . . the barristers in the province of Quebec, knowing as they do that these judges are not competent to deal with matters of French civil law, generally advise their clients to limit their claims to \$1,999, in order to preclude any possibility of appeal to the Supreme Court."<sup>133</sup> But Demers' Bill generally received much less support than had its predecessors and the motion to give his Bill second reading was defeated after a short debate. Following Demers' efforts there was no further expression in Parliament of the classical Quebec complaint of the Supreme Court's appellate jurisdiction. Even in 1949, during the lengthy debate on the abolition of appeals to the Privy Council, no Quebec spokesman voiced the classical objection as a reason for distrusting the Supreme Court as an ultimate appellate court for all of Canada.

The open parliamentary attack on the practice of allowing a predominantly common-law Canadian court to hear appeals involving Quebec's Civil Code was replaced by a much more academic concern for identifying the precise effects which the common-law influence was having on Quebec's Civil Code. Over the past few decades, and on an increasing scale in recent years, Quebec jurists, both on and off the bench, have addressed themselves to various phases of this question. In some instances their concern has taken the form of revealing elements of Quebec's civil law which, as a result of Supreme Court or Privy Council decisions, have been impregnated with common-law legal norms. For example, in some areas of family law,<sup>134</sup> in the law



relating to wills<sup>135</sup> and with respect to those very brief articles of the Civil Code dealing with civil responsibility,<sup>136</sup> a number of writers have drawn attention to the tendency of Anglo-Saxon judges to employ common-law precedents in interpreting parts of Quebec's Code or in filling lacunae in its provisions. Also there has been some quarrel over the Supreme Court's treatment of French authorities and its failure to discern differences between Quebec's Code and French civil law.<sup>137</sup>

But this kind of analysis has, on the whole, focused not so much on the common-law judges' treatment of substantive points in Quebec's civil law as on the more fundamental way in which common-law judicial techniques have affected the basic form of Quebec's civil-law system. Here a number of critical points emerge. The one which has been most often cited is the grafting of the rule of *stare decisis* on to the civil law system.<sup>138</sup> Decisions of the Supreme Court and the Privy Council on Quebec civil law have been accepted as binding precedents by Quebec courts. That the *strict* application of *stare decisis* is alien to the French civil-law tradition is generally acknowledged. However a number of writers have pointed out that the difference between the French system of codified law and the English system of case law with respect to the authority of decided cases can be overdrawn.<sup>139</sup> A written code must inevitably leave some openings for judge-made law and although "a single judgement is not a binding authority even on the Court which pronounced it. . . a series of judgements may be accepted as conclusive."<sup>140</sup> Besides, where decided cases were looked upon as embodying values essential to Quebec's distinctive culture, Quebec lawyers were apt to look to the common-law doctrine of precedent "as a means of safeguarding the traditions and principles inherited from the French law."<sup>141</sup>

But more serious than the mere application of *stare decisis* to Quebec's civil law is the contrast which has often been made between the general style of jurisprudence associated with the common-law tradition and that which is considered most appropriate for the interpretation of a codified system of civil law such as Quebec's. What has most often been emphasized here is that Quebec's Civil Code should be treated judicially as a logical system.<sup>142</sup> This means that in working out its meaning or in applying its provisions to unforeseen circumstances the proper mode of reasoning is deductive—judges should try to infer their conclusion from the basic principles or philosophy embodied in the Code. When it is deemed necessary to go outside the Code itself, French Canadian jurists have been inclined to regard as of equal if not greater authority than previous judicial decisions, the writings of leading French jurisconsults and the original sources of the various articles of the Code, including the official reports of the Commissioners who drew up the Civil Code.<sup>143</sup> But this style of jurisprudence is held to be fundamentally different from the techniques of statutory interpretation normally employed by common-law judges,<sup>144</sup> techniques which the Privy Council, and possibly some members of the Supreme Court, were apt to apply to Quebec's Civil Code. The literal interpretation of statutes favoured by

English judges, their unwillingness to consult legislative history, and their superior knowledge of and respect for English judicial precedents as compared with French *doctrine* all ran counter to the method of interpretation favoured by French Canadian jurists.<sup>145</sup>

Those who were concerned about the influence of these alien techniques on Quebec's distinctive private law system could not, of course, attribute this influence solely to the Supreme Court of Canada. To begin with, it was clear that with or without the Supreme Court, the judicial structure of Quebec had been thoroughly Anglicized. Professor Louis Baudouin begins his analysis of the impact of common-law forces on Quebec civil law with this fact:

The judicial system has much in common with the British judicial system, at least in its essential office—that of magistrate. The magistrate in Quebec and in Canada, in the provinces of English origin, is only appointed after a certain number of years of practice as a lawyer. It is the same system that prevails in Great Britain—the magistrate is not, as in France, a career magistrate. In the office of magistrate, then, the practices which the magistrate developed in the legal profession, will make themselves felt, particularly in the way judgments are drawn up.<sup>146</sup>

As Professor Baudouin points out, not the least of the consequences of the Anglicization of Quebec's courts is that the decisions of their judges have taken the form of the discursive, personal opinions delivered by common-law judges, rather than the anonymous, concise statements of judgment and supporting *motifs* such as are given by judges in the continental civil-law tradition. While the Supreme Court and the Privy Council may have played a part in applying the common-law method of rendering decisions to Quebec's civil law, the process had much earlier roots. Again to quote Professor Baudouin: "Added to that, right after the Cession of Canada, the majority of magistrates charged with carrying out justice in Quebec, . . . were English magistrates. They applied French law . . . according to ways of thought and a method that were purely British and related to common law. The custom of drawing up judgments in the same way as English decisions were drawn up was maintained and it was to survive even the promulgation of the Civil Code of Quebec."<sup>147</sup>

With regard to those alien techniques of interpretation imposed by Anglo-Saxon judges on Quebec's Civil Code, the Supreme Court was likely to attract less criticism than the Privy Council. No doubt this was partially the result of the fact that the Supreme Court was clearly the junior appeal court under the control of the Judicial Committee. But probably the more important explanation was the presence on the Supreme Court of at least two, and after 1949, three judges who had been trained in Quebec's civil-law system. Jurists such as Mignault and Baudouin, in elucidating the difference between French and English judicial approaches to the Civil Code, tended to contrast Quebec courts and the Supreme Court on the one hand, with the Privy Council on the other. Indeed to some extent the Canadian civilian lawyer's critique of the Judicial Committee's

interpretation of Quebec's Civil Code paralleled his common-law confrère's criticism of the Judicial Committee's interpretation of the B.N.A. Act. Within both groups there was a desire for a more sensitive adaptation of written laws to changing local circumstances and a belief that such jurisprudence would more likely be forthcoming from indigenous judges.<sup>148</sup>

One factor which undoubtedly increased the Supreme Court's stature in the eyes of its Quebec observers was the appointment to its bench of some outstanding Quebec jurists. Two of the more modern appointments brought particularly distinguished civilian scholars to the Court. Thibaudeau Rinfret, who served the Court for 29 years, during the last 10 of which he was its Chief Justice, had been a Professor of Comparative Law and Public Law at McGill University for 10 years prior to receiving his Supreme Court appointment in 1924. Mr. Justice Mignault who spent more than a decade on the Supreme Court bench was the author of many scholarly works including an authoritative nine-volume treatise on the civil law of Quebec. Their attitudes to the juxtaposition of the two legal systems in the work of the Supreme Court indicate some of the problems and possibilities of legal biculturalism which leading French Canadian jurists were coming to recognize.

The difference between the ways in which they interpreted their roles as Supreme Court judges reflects the different emphases of their academic backgrounds. Chief Justice Rinfret was struck by the opportunities for using comparative law techniques which the bicultural character of the Supreme Court provided. Shortly after his retirement from the bench he summarized these advantages in the following passage:

Perhaps to one who has not had access to the conferences of the Court, it might be hard to realize the unique service rendered, in the course of the discussions, by the Judges raised in one or the other system of law endeavouring to secure from brother Judges explanations on the meaning and purport of some articles of the Quebec Civil Code, or likewise, of some precedents under the Common Law. When one has been accustomed to a particular aspect of his law, he is most apt to take for granted a particular interpretation, which, very often he has ceased to take the trouble of analyzing. But if he is asked to give some explanation of it, then he is compelled to go deeper into the reason for his interpretation; and one cannot begin to appreciate to what extent and how much more thorough becomes his grasp of the intention of the legislator.<sup>149</sup>

Rinfret was inclined to deny that the dual system of laws presented any grave difficulties for the Court and once remarked that in all of his 29 years of experience on the Court he had not found one case in which the common law and civil law would have yielded different results.<sup>150</sup> Mr. Justice Mignault, on the other hand, so much of whose scholarship had been devoted to the elucidation of the civil law, was concerned, above all, with the judicial enrichment of that law by applying to it those sources of civilian jurisprudence which



would most appropriately amplify its meaning. He was very much opposed to importing into the interpretation of Quebec's civil-law system authorities from a foreign system. Shortly after taking his place on the Supreme Court he vowed that he would lose no opportunity "to insist that each system of law be administered according to its own rules and in conformity with its own precedents."<sup>151</sup>

While there was undoubtedly a divergence in Rinfret's and Mignault's responses to legal dualism, what they both contributed to the Court was a very high level of professional legal competence. Judges of their stature were undoubtedly much more able to dominate the Court's decision-making in their fields of expertise. This is borne out by the voting record of the Court in Quebec appeals during the years in which they were members of the Court. During their periods of tenure there were very few decisions in Quebec appeals which found the Quebec judges split or defeated by their common-law brethren. On the contrary, in the vast majority of Quebec appeals, the Court was unanimous and the decision was given by a civilian judge.<sup>152</sup>

But the presence of Quebec jurists, even very eminent ones, has not convinced all Quebec lawyers that the Canadian Supreme court is much better qualified than the Judicial Committee to serve as an ultimate court of appeal for Quebec's private law system. Many would no doubt agree with Albert Mayrand when he asks, "Is not the Supreme Court exposed to playing unconsciously, in the Canadian context, the role of unifier of the law that the Judicial Committee of the Privy Council is blamed for having played in the imperial context?"<sup>153</sup> Also, the comparative law advantages of the Supreme Court may not appeal to those whose main concern is to preserve the purity of Quebec's civil-law system. And even those who are more prepared to see the Civil Code augmented or extended by means of novel or alien precepts might prefer to see this process undertaken by the Quebec legislature rather than a federal court.<sup>154</sup>

At least this much can be said about the evolution of French Canadian attitudes to a supra-provincial appeal court—by 1949, little, if anything, was left of that high regard which an earlier generation of Quebec lawyers had shown for the Judicial Committee's competence in French civil law. This was as true of its bilingual qualities as of its knowledge of Quebec's Civil Code and its supporting jurisprudence. English-speaking Canadian judges were more apt than members of the Privy Council to be sensitive to the peculiar challenge posed by the dualism of Canada's legal culture. Not very many English law-lords would be likely to subscribe to Mr. Justice Cartwright's view that for members of the Supreme Court "It is one of our duties to be bilingual."<sup>155</sup> But the erosion of admiration for the Judicial Committee does not, however, appear to have stimulated very much enthusiasm within Quebec for the abolition of appeals to the Privy Council. In part, the disillusionment with the Privy Council's treatment of Quebec's civil law was counter-balanced by approval of its interpretation of the B.N.A. Act. Commenting on the Privy Council's prestige in Canada, Professor Baudouin remarked that, "This authority has also been given support by the fact that in certain

matters of constitutional law the Privy Council has sometimes been able to decide in favour of the rights of the provinces, when the trend was towards provincial autonomy. . . ."<sup>156</sup>

Indeed looking to the Supreme Court's future régime as Canada's final court of appeal, Quebec hostility was more likely to be aroused by distrust of its capacity for acting as a fair arbiter of Canada's federal system than by the view that it was inadequate as a tribunal for reviewing decisions concerning Quebec's Civil Code. The resurgence of the latter conviction would depend very much on which legal philosophy became most influential in Quebec's legal and political community. It was a question of whether legal dualism would be looked upon as a positive good to be enhanced by the bicultural composition of the Supreme Court, or whether the integrity and purity of Quebec's civilian tradition would be regarded as a nobler aspiration and one which was threatened by the existing organization of the Supreme Court.

### *3. The agitation to abolish Privy Council appeals*

As we have seen Canadian interest in abolishing appeals to the Privy Council had been expressed as early as 1875 when the Liberal government of the day had unsuccessfully endeavoured to curtail the right of appeal from the Supreme Court of Canada to the Privy Council. Again, in 1888, three years after the Privy Council had granted Louis Riel an appeal,<sup>157</sup> a Dominion statute purported to prohibit Privy Council appeals in criminal cases.<sup>158</sup> This legislation remained unchallenged until 1926 when the Judicial Committee found it invalid on the grounds that it was repugnant to overriding imperial legislation,<sup>159</sup> a decision which stirred up considerable controversy in Canada. In the meantime, opposition to Privy Council appeals had been constantly fed by resentment of the great expense such appeals imposed on Canadian litigants, by the fact that Dominion cases sometimes appeared to be treated as of secondary importance by the English law-lords, and in some instances by disgruntlement with some of the Privy Council's actual decisions.<sup>160</sup>

But the main force behind any really serious opposition to Privy Council appeals was a growing sense of Canadian nationalism. As Canada drew closer to realizing complete self-government in the legislative and executive spheres, there was an increasing tendency to regard Canada's judicial subordination to the Privy Council as an anomalous contradiction to this general pattern of autonomy. Arguments put forward for retaining the Privy Council appeal usually turned on the importance of the imperial link which the Judicial Committee allegedly provided or the superior capacities of the Judicial Committee's members for dispensing Canadian justice. To all these arguments the judicial nationalist was apt to reply with the question posed by John Ewart: "Is there any reason why, of all the countries in the world in population and intelligence equal with Canada, our great Dominion should be the only state that is willing to acknowledge its inability to settle its own lawsuits?"<sup>161</sup>



It was not until the 1930's that this nationalist desire to abolish Privy Council appeals became an important political agitation in Canada. Then, two developments were of crucial importance in the emergence of the abolitionist movement as a significant and effective force. The first of these was the Statute of Westminster which legally capped the achievement of Dominion status. The Statute of Westminster removed the legal bar to abolishing Privy Council appeals in matters subject to federal legislative jurisdiction—a point which the Privy Council itself confirmed in *British Coal Corporation v. The King*.<sup>162</sup> This left only one serious constitutional question regarding the abolition of appeals. It was the question of whether the Dominion Parliament had the power to make the Supreme Court Canada's exclusive ultimate court of appeal, not only in federal law matters but also in those fields of law subject to provincial legislative power. This question was finally settled in the Dominion's favour in 1947 by the Privy Council.<sup>163</sup> The Judicial Committee's judgment at that time was clearly based on the implications which it saw flowing from the Statute of Westminster. Speaking for the Committee, Lord Jowitt gave the following justification of reading into Section 101 of the B.N.A. Act a federal power to establish an exclusive and general final appellate court for Canada: "To such an organic statute the flexible interpretation must be given which changing circumstances require, and it would be alien to the spirit, with which the preamble to the statute of Westminster is instinct, to concede anything less than the widest amplitude of power to the Dominion legislature under s.101 of the Act."<sup>164</sup> The legal consolidation of Dominion autonomy had apparently converted the members of the Judicial Committee to judicial nationalism too.

The Statute of Westminster was, then, the key factor in clearing away the legal obstacles to the abolition of appeals. But the decisive factor in creating a political basis for terminating Privy Council appeals was the series of constitutional decisions rendered by the Judicial Committee in the 1930's which invalidated some of the essential legislation in the Canadian government's attack on the consequences of the great decisions. These decisions, together with the precedents they applied and established, convinced many Canadians that the Judicial Committee's interpretation of the B.N.A. Act had imposed a constitutional strait jacket on Canada which prevented its central government, either alone or in co-operation with the provinces, from dealing effectively with nation-wide social and economic problems.<sup>165</sup> Those who shared this dissatisfaction with the Privy Council's interpretation of the B.N.A. Act now had a very substantial reason for advocating that Canada exercise her newly acquired powers of nationhood and terminate appeals to the Privy Council.

It is significant that this reaction to the Privy Council's treatment of the division of legislative powers under the B.N.A. Act elicited strong support from within the Conservative party for the abolition of appeals. Indeed it was an ex-Conservative Cabinet Minister, M. C. Cahan, a veteran of that Conservative administration which had

seen its "New Deal" programme so thoroughly emasculated by the Privy Council's decisions, who, in 1938, launched the parliamentary assault on the Privy Council appeal.<sup>166</sup> Hostility to the decentralizing tendencies of the Privy Council's decisions also found ready support within the C.C.F. party.<sup>167</sup> Thus when the Liberal administration endorsed the objective of abolishing Privy Council appeals it did so knowing that this policy would not be seriously opposed by either of its major competitors in national politics.

It was not surprising that neither Justice Minister Ernest Lapointe in 1938-9 nor Justice Minister Stuart Garson in 1949 explicitly cited antagonism towards the Privy Council's constitutional decisions as a prime reason for abolishing appeals. They were both too wary of provincial sensitivities to base their case for establishing the supremacy of the Supreme Court on opposition to the Privy Council's tendency to bolster provincial autonomy. However their rather simple argument that national sovereignty required the abolition of appeals became much more convincing when it was set in the context of widespread disgruntlement with the Privy Council's constitutional handiwork.

For our purposes here the most significant aspect of this reaction to the Privy Council's constitutional interpretation, and the force which this reaction added to the agitation for the abolition of appeals, is the light which this development sheds on Canadian attitudes to the role of the judiciary in constitutional adjudication. It was not enough for the Judicial Committee's critics simply to attack the tendency of that tribunal's constitutional jurisprudence to strengthen the provinces' legislative powers at the expense of the Dominion's. They had to show, not only that this was bad policy, but that it stemmed from an improper technique of constitutional interpretation.

On this point there were two distinct schools of thought among the politicians and constitutional experts who attacked the Privy Council. First there were those, more prominent in the ranks of the professors than among the parliamentarians, who criticized the Privy Council for having failed to bring to the interpretation of the Constitution enough of that deliberate statesmanship that would adjust the terms of the Constitution to the country's changing environment. V. C. MacDonald was one of the most articulate members of this camp. He attacked the Privy Council on the grounds that "being free to mould the Constitution within large limits in a way consonant with changing needs, the Privy Council refrained from doing so; and thereby has left us with a Constitution ill-adapted to government under present conditions and modes of thought."<sup>168</sup> Aware of the large opportunities for judicial law-making which the Constitution inevitably imposed on its judicial interpreters, those who shared MacDonald's view advocated that judges should apply to this task of judicial review a deep understanding of the consequences of their decisions on the capacity of Canadian legislatures—Dominion and provincial—for meeting the country's pressing needs.

On the other hand, there were those who opposed the Privy Council's treatment of the B.N.A. Act. The reason given was not because of its failure to impart into the process of constitutional interpretation enough knowledgeable awareness of the policy implications of judicial review but, on the contrary, because it had read into the Constitution a policy of provincial autonomy. This policy, they alleged, contravened the intentions of the framers of the B.N.A. Act and the clear meaning of the Act's central provisions. The most influential spokesman of this viewpoint was William F. O'Connor, the Parliamentary Counsel to the Senate who was commissioned in 1938: "To compare the text of Part VI of the British North America Act, 1867, headed 'Distribution of Legislative Powers' with (a) such pre-Confederation records and (b) such pronouncements of the Judicial Committee of the Privy Council as define or disclose the legislative powers of the Parliament of Canada at the present time."<sup>169</sup> O'Connor prefaced his report to the Senate with the basic assertion that the distribution of legislative powers originally incorporated in the B.N.A. Act "was repealed by *judicial legislation* and different legislative machinery was substituted." He concluded that "in these circumstances I think that not amendment of the Act, but enforced observance of its terms is the proper remedy."<sup>170</sup>

These two divergent points of view had one important assumption in common. They both took it as axiomatic that the application of the appropriate techniques of interpretation to the B.N.A. Act, whether in the form of a larger dose of knowledgeable judicial statesmanship or greater fidelity to the true meaning of the constitutional text, could only be achieved by transferring the highest judicial power from English to Canadian judges.<sup>171</sup> This common assumption was their counter argument to the old contention of the Privy Council's defenders that the very distance of the Judicial Committee from active involvement in the Canadian scene "removes causes from the influence of local prepossession."<sup>172</sup> Now the abolitionists were inclined to argue, as had Edward Blake 75 years earlier,<sup>173</sup> that only Canadian judges with the first-hand experience of living within Canada's federal system could provide an intelligent and responsible interpretation of the country's federal constitution.

The belief in the superior qualities of the Privy Council for mediating Canadian constitutional controversies had presumably been based on two beliefs—that it would be a more reliable guardian of minority rights, and that it would be a more impartial arbitrator of federal-provincial disputes. But it had become difficult to square either of these theories with the realities of the Judicial Committee's judgments in constitutional matters. On the question of the rights of minorities within provinces, the Privy Council's decisions could hardly be viewed as demonstrating an unusually broad interpretation of the educational rights guaranteed religious minorities under Section 93 of the Constitution. In neither of the two twentieth-century tests of the Privy Council's attitude to this question did it uphold the claim of the aggrieved minority.<sup>174</sup> As for the alleged impartiality of the tribunal, not even the Judicial Committee's



staunchest supporters denied that on the whole its approach to the division of legislative power in Canadian federalism had been governed by an overriding concern to protect the autonomy of the provinces against suspected federal encroachments.<sup>175</sup>

While these developments made it increasingly difficult for retentionists to defend continued appeals to the Privy Council on the basis of its dispassionate objectivity in umpiring federal and ethnic conflicts in Canada, still, the arguments of the abolitionists raised serious dilemmas for the future exercise of judicial review by a Canadian tribunal. Some advocated a more adept adjustment of the written Constitution to the nation's changing needs; others wanted the Constitution interpreted in terms which were more strictly in accordance with the intentions and words of its framers. Both groups tended to imply, in calling for the abolition of Privy Council appeals, that if Canadian judges followed these recommended approaches, they would come to unambiguous and uncontroversial results. But this inference is difficult to maintain. After all, there is likely to be a considerable dispute among well-informed Canadians as to what constitutional adjustments the country requires. There were many Canadians in 1949, as there are now, who would look upon a regard for provincial autonomy as the consideration which ought to govern judicial statesmen in applying the B.N.A. Act.<sup>176</sup> Also, among those who believe that judges should above all be true to the intentions of those who designed the Confederation pact, might be found many who, unlike O'Connor, believe that such a course would not lead to results substantially different from those wrought by the Privy Council's decisions.

What the debate over the abolition of Privy Council appeals revealed was that in deciding whether challenged legislation fell under the jurisdiction of the provinces or the Dominion, the courts would have to make decisions that could not be determined exclusively by purely legal considerations and that these judicial policy choices could have a decisive effect on the balance of power within the Canadian federal system. Given a wide-spread acknowledgement of this inescapable implication of judicial review, the important question by 1949 was not whether Canada should enjoy judicial autonomy but how the Privy Council's Canadian replacement should be organized to fulfil its role as the judicial arbiter of Canadian federalism.

In the parliamentary debate on the 1949 Amendment to the Supreme Court Act which made the Supreme Court Canada's ultimate court of review, it was this latter question which elicited the sharpest notes of concern from Quebec representatives. There was no significant support among exponents of provincial rights, either from Quebec or the other provinces, for the retention of Privy Council appeals. The official Opposition's attempt to have the Supreme Court legally bound in the future by all of the Judicial Committee's past decisions was supported mainly by English-speaking lawyers who claimed that they were carrying out a mandate of the Canadian Bar Association.<sup>177</sup> The point of dissent which was most often and most vigorously made concerned the lack of any provincial participation in the reconstruction



of Canada's highest judicial organ. In the words of Mr. Léon Balcer: "The house is called upon to establish a final court to settle disputes which may arise between the central power and the provinces. We find it inconsistent that only one of the parties to a pact should be called, or rather that it should arrogate to itself the right to determine alone what tribunal will decide on its disputes with the other party."<sup>178</sup> The only amendment sponsored by a Quebec M.P. was directed at the Supreme Court's qualifications for adjudicating federal disputes. Wilfred La Croix proposed that four of the Supreme Court justices be nominated by provincial governments and that the Supreme Court's decisions be unanimous whenever they affected provincial rights.<sup>179</sup>

After 1949, distrust of the Supreme Court's objectivity in dealing with Dominion-provincial conflicts has continued to be the most prominent objection made by Quebec representatives. The fact that the Supreme Court's judges are all appointed by the federal government and that their appointments are in no way subject to review by provincial governments lies at the base of this distrust. In 1953 the point to which Quebec spokesmen have so often returned was made by Antonio Perrault when he wrote: "The Canadian constitution is subject to interpretation. What are the powers granted to the federal Parliament and what to the provincial legislatures? Where is the dividing line? If there is a conflict, it is for the Supreme Court to decide. These judges are named by the federal government. In certain circles, the assumption is made that the provinces are not sufficiently protected."<sup>180</sup> The fears of those who have taken up this argument were not put to rest by the fact that at least three of the nine members of the Supreme Court would have to come from the province of Quebec. Nor were these fears allayed by Prime Minister St. Laurent's denial that the "substitution of one body of men for another body of men to pronounce upon conflicts which may arise in connection with provincial or minority rights . . . could have any effect."<sup>181</sup> Whatever support this viewpoint has found within Quebec has been sustained, not by any tangible evidence that the members of the Supreme Court are biased in favour of the level of government which appointed them, but by objection in principle to the constitutional arbitration by a tribunal which is organically part of the federal level of government.

This body of opinion which appears to be confined mainly to the province of Quebec now poses the main challenge to the continued existence of the Supreme Court in its present form. The Amendment to the Supreme Court Act in 1949 had the negative effect of abolishing all appeals from Canadian courts to the Privy Council and the positive effect of completing the establishment of a unitary judicial structure with a federally-controlled Supreme Court at its apex. The Judicial Committee, in validating the Act which established the Supreme Court's position at the top of Canada's judicial hierarchy, affirmed that in doing so it was enabling Canada to enjoy the benefits of a nationally-controlled, unitary system of courts. "It is," said Lord Jowitt, "a prime element in the self-government of the

Dominion, that it should be able to secure through its own courts of justice that the law should be one and the same for all citizens."<sup>182</sup> The main question for the future is whether this unitary scheme of judicial organization with the Supreme Court at its head can continue to co-exist with the increasing emphasis in Canadian politics, especially in Quebec, on provincial rights. As early as 1956, there were indications that Quebec opinion might insist on a negative answer to this question. The Quebec Royal Commission of Inquiry on Constitutional Problems (The Tremblay Commission) stated that

. . . it is fundamentally repugnant to the federative principle that the destinies of the highest tribunal of a country be surrendered to the discretion of a single order of government.

And yet, as everyone knows, in Canada the Supreme Court depends on the central government alone from the threefold point of view of its existence, its jurisdiction and its personnel. It is to one or another of these three points that the main criticism of the Supreme Court of Canada is now being directed.<sup>183</sup>

The Tremblay Commission's Report contained the most severe criticism which has been directed at the Supreme Court's present scheme of organization since the abolition of Privy Council appeals in 1949. In the next chapter of this study we will drop the strictly historical account of the development of attitudes to the Supreme Court and turn to a more analytical treatment of the issues raised by the Tremblay Report and other sources of concern regarding the Supreme Court which have been expressed in recent years.

### *E. Evolution of the Supreme Court's Jurisdiction*

Before turning to an analysis of contemporary issues, there is one other aspect of the Supreme Court's development which must be taken into account if its current position is to be fully understood: that is, the evolution of its jurisdiction. The statutory rules setting out the Court's jurisdiction and judicial interpretation of these rules determine the kind of work the Court does and therefore the kind of influence it can have on Canada's legal system. Since the passage of the original Supreme Court Act in 1875 many changes have been made in the rules governing the Court's jurisdiction. Many of these have been of very minor importance and have been designed to overcome technical difficulties or to clarify ambiguities in the Supreme Court Act which have often been identified by the Court's bar or bench. But a number of amendments to the Supreme Court Act have had a more decisive impact on the Court's character and it is only with these that we shall concern ourselves here.

The only way to characterize the rules governing the Supreme Court's jurisdiction in its earliest days is to say that they were a chaotic hodge-podge which caused great confusion to the Court's bar and bench. In 1904 E. R. Cameron, the Registrar of the Supreme Court, noted the amount of litigation which this confusion had

caused. In the decade from 1893 to 1903 there had been 50 motions to quash appeals in the Supreme Court for want of jurisdiction—more than twice the number reported in the eighteen years preceding. Cameron gave the following explanation for this situation: "The reason for this is obvious when we examine critically the sections of the Act dealing with jurisdiction. We find there a great lack of precision in the expression of the mind of parliament, and the sections are so ill-arranged that even after a very careful and minute examination it is often difficult to determine whether a case is appealable or not."<sup>184</sup>

But besides the confusion caused by sloppy draughtsmanship, there were, as Professor Laskin has pointed out, various "sectional interests"<sup>185</sup> at work which did much to account for the variegated nature of the Court's jurisdiction. From the outset the right of appeal from Quebec was subject to a \$2,000 monetary requirement.<sup>186</sup> In 1897 Ontario, too, which like Quebec had its own Court of Appeal, was able to have Ontario appeals limited although in this case the monetary requirement was only \$1,000.<sup>187</sup> On the other hand, in the other provinces which had no Court of Appeal and in which the Superior Court, sitting *en banc*, was the highest provincial tribunal, there was no inclination to limit appeals to the Supreme Court. On the contrary, in those provinces the right of appeal was virtually unlimited from final judgments of the highest court of last resort in cases originating in a Superior Court. In certain other cases there was a wide right of appeal where the action did not originate in a Superior Court.<sup>188</sup> For example, in 1889, as a result of pressure from British Columbia, provision was made for appeals from that province's assessment boards to the Supreme Court.<sup>189</sup> Not only did this mixture of jurisdictional provisions result in a complete lack of uniformity in the right of appeal in the different provinces, but also the lack of any significant restrictions on appeals from the Maritime and Western provinces meant that the Court was often forced to deal with matters of a very trifling nature.

In 1920 many of these anomalies were removed. The Supreme Court Amendment Act of that year introduced a high degree of uniformity into the rules governing the Court's appellate jurisdiction.<sup>190</sup> Appeals, *de plano*, or as of right, in all the provinces were subjected to the monetary limit of \$2,000 which had previously applied only to Quebec appeals. In all other cases appeals were to be by special leave of the highest court of last resort in the province. The Minister of Justice, C. J. Doherty, in introducing the legislation explained that "the Bill substantially involves giving to the provincial courts in all the provinces exclusive rights to grant leave to appeal in cases not now appealable *de plano*."<sup>191</sup> He later indicated that his willingness to surrender so much control over the Supreme Court's docket to the provincial courts was in part based on his conviction that the provincial legislatures "control appeals" at least in provincial law matters.<sup>192</sup> The result was that after 1920, while there was now considerable uniformity in the Supreme Court's appellate jurisdiction, the Supreme Court had less power in granting



leave to appeal than the provincial courts. The Supreme Court's power to admit an appeal in cases not appealable *de plano* was limited to cases involving money or property over a specified value and constitutional issues. Furthermore, the Supreme Court could not grant leave unless it had first been refused by a provincial court.

In 1949, the most significant change in the jurisdictional provisions of the Supreme Court Act was effected in Section 41 which gave the Supreme Court an independent power of admitting appeals. According to this clause the Supreme Court, subject to some minor qualifications, can grant leave to appeal "from any final or other judgment of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, *whether or not leave to appeal to the Supreme Court has been refused by another court.*"<sup>193</sup> This clause did not take away from provincial courts their power to grant special leave to appeal to the Supreme Court. But in effect it granted the Supreme Court an overlapping power to admit appeals, a power which made it far more possible for the Supreme Court itself to determine the legal issues with which it would deal. Summarizing the wide powers of admitting appeals now possessed by the Court, Professor Laskin has written that:

By and large, it is open to the Court to give symmetry and uniformity to Canadian law, regardless of the terms of provincial statutes governing appeals or review in the provincial courts. For the Supreme Court . . . is not confined to the admission of appeals from final judgments of the highest court in the provincial judicial hierarchy: it is within the Court's power to hear an appeal from any judgment (subject to the qualifications mentioned) of the highest provincial court of final resort in which judgment can be had in a particular case.<sup>194</sup>

Of course, mere possession of a power does not determine how it will be used. Since 1949, the Court in a number of cases in which dissatisfied provincial litigants have petitioned the Court for leave to appeal has certainly not manifested an overly aggressive desire to review the judgments of provincial courts. It has on the whole developed a very cautious policy on the admission of appeals. One of the first tests of its interpretation of its powers under Section 41, indicated that "the Supreme Court is likely to insist on exhaustion of any local remedies available to challenge a judgment which is not directly appealable."<sup>195</sup> A recent study of the Court's application of Section 41 concludes that "the Court's attitude indicated by the manner in which it has exercised its power to admit appeals would appear to be narrow and restrictive."<sup>196</sup>

It might be well before concluding this historical section to give a capsule view of the Supreme Court's overall jurisdiction as it has emerged from 75 years of development. The primary feature of the Supreme Court's jurisdiction is unchanged; now, as in 1875, it is primarily an appellate court. Its jurisdiction has been reduced from what it originally was mainly by virtue of the transfer, in 1887, of



its original jurisdiction in cases involving the federal Crown to a separate Exchequer Court.<sup>197</sup> Now the Court's original jurisdiction is restricted essentially to two areas: its individual judges can hear requests for habeas corpus in connection with commitments under federal criminal law,<sup>198</sup> and the Court may be asked to give its opinion on questions, mainly of a constitutional nature, submitted to it by the Governor in Council.<sup>199</sup> The latter element in the Court's jurisdiction represents a considerable expansion of the Court's role in giving "advisory" opinions on constitutional questions. The original doubts as to Parliament's power to vest this kind of responsibility in the Supreme Court have been removed,<sup>200</sup> and over the years the federal government has shown an increasing tendency to call upon the Supreme Court to settle questions concerning the division of powers.<sup>201</sup>

But the overwhelming proportion of the Court's business concerns the review of other courts' decisions in all areas of provincial and federal law.<sup>202</sup> Some of this appellate jurisdiction is established in particular statutes such as the Bankruptcy Act, Dominion Controverted Elections Act, Exchequer Court Act, National Defence Act, Railway Act and Winding-Up Act.<sup>203</sup> But the main provisions for civil and criminal appeals are contained in the Supreme Court Act and the Criminal Code.

Taking civil cases first, as we have seen, there are now three main routes whereby a case may reach the Supreme Court. First, a litigant has an automatic right of appeal from the highest court of final resort in a province if the amount in controversy exceeds a certain monetary value or if the judgment appealed from was pronounced in habeas corpus or mandamus proceedings.<sup>204</sup> In 1956 the jurisdictional amount was raised to \$10,000.<sup>205</sup> This is the most common source of appeals and it is open to the obvious objection that "it is the issues arising, not the amount of money or form of procedure, that renders a case of sufficient moment to be determined by the highest tribunal."<sup>206</sup> If a litigant has no appeal as of right, he can apply either to the highest court of final resort in the province for leave to appeal to the Supreme Court or he can ask the Supreme Court itself to grant leave to appeal.<sup>207</sup> The general pattern is to make application first to the provincial court and then, if this application is turned down, petition the Supreme Court. This at least gives the litigant two opportunities to have his case heard in the Supreme Court. It should be noted, however, that the Supreme Court has refused to review cases in which the provincial court has granted leave to appeal.<sup>208</sup> Still, this is a rare occurrence, so that in practice the provincial courts continue to have a very extensive influence on the composition of the Supreme Court's docket. In deciding whether or not to grant appeals the courts have professed to be guided by the criterion of "matters of public interest,"<sup>209</sup> but this, needless to say, is a rather ambiguous formula.

On the criminal side appeals may be taken to the Court in summary conviction offences only after the Court has granted leave.<sup>210</sup> However, a person who has been sentenced to death and whose conviction

is affirmed by the provincial court of appeal may appeal to the Supreme Court, without requesting leave, on any issue of law or fact or mixed law and fact.<sup>211</sup> Also in capital cases, if the acquittal of a person is set aside by the provincial appeal court, an appeal as of right lies to the Supreme Court.<sup>212</sup> With non-capital indictable offences, where the conviction is affirmed by the provincial appeal court, the right to appeal without leave is restricted to a question of law on which a judge of the court of appeal has dissented.<sup>213</sup> While the provisions concerning criminal appeals have caused some doubts as to their correct interpretation, the Supreme Court itself has had the exclusive power of resolving these problems and clarifying the Court's jurisdiction in this area.

In concluding this section of our study two general points should be made about the evolution of the Supreme Court's jurisdiction. First, this evolution has gone on without receiving or being subject to any constitutional definitions. Secondly, the development has entailed a potentially centralizing or unifying effect on Canadian federalism. The one constitutional point which has been of crucial importance in enabling the federal Parliament to adjust and expand the Court's appellate jurisdiction is that Section 101 of the B.N.A. Act gives Parliament an exclusive power to regulate appeals to the Supreme Court. Furthermore the Privy Council's decision in the *Crown Grain Co.*<sup>214</sup> case and again in the 1947 reference case on the Supreme Court Act,<sup>215</sup> confirmed that this power precluded any power of the provincial legislatures to curtail appeals from provincial courts, even in areas of law subject to provincial legislative power. Thus the power to determine the appellate system within the Canadian judicial structure is undivided and rests exclusively with the central legislature. Further, in exercising this power the federal Parliament has not been subject to any significant constitutional rules.<sup>216</sup>

What this means of course is that Canada's judicial system is essentially unitary, not federal. In terms of its potential power to introduce uniformity into the country's legal system, the Canadian Supreme Court is closer to the English House of Lords than it is to the American Supreme Court. Of course, the Supreme Court must recognize local differences when there are statutory variations in the laws of the provinces; but even here it is by no means bound to follow provincial court interpretations of provincial statutes. Whereas in the United States where, at least since 1938, the Supreme Court has held that "there is no federal general common law"<sup>217</sup> and in cases involving diversity of citizenship it must be guided in applying state law by the decisions of state courts, in Canada the Supreme Court is "in a much stronger position to develop a unified common law."<sup>218</sup> In a word, the Supreme Court of Canada has emerged with far more of the characteristics of a general, national court of ultimate appeals such as exists in Great Britain than those of a specialized guardian of the federal constitution and federal law such as exists in the United States.

The Supreme Court's elevation in 1949 to a position of true judicial supremacy did not either then or later make the Court a major focus of public attention. Canadians traditionally have not been inclined to regard the organization of their country's judicial system as being as influential an element in their system of government—or as malleable—as its legislative, executive, and political institutions. This is generally the result of conventional views as to the independence of the judiciary and its duty to interpret, rather than make the law. Also, in the case of the Supreme Court, neither the Canadian constitution nor its judicial system imposes on Canada's ultimate appellate court as distinctive or as consequential a set of responsibilities as are imposed, for instance, on the United States Supreme Court. Nevertheless, the attainment of judicial autonomy did intensify the interest of a small, although potentially influential, group of Canadians in some of the basic questions relating to the Court's role in the Canadian system of government. The Court's actual performance since 1949 has increased this interest, as has the growing concern with bicultural and federal problems.

It is the purpose of Chapters III, IV and V of this study to set down in some detail those aspects of the Court's work since 1949 which have an immediate bearing on bicultural and bilingual issues. However, before proceeding to this part of the study it is worthwhile describing the principal forms of criticism and debate which have emerged in recent years in relation to the role of the Supreme Court. An analysis of these viewpoints should serve as a useful guide to the relevancy of the findings set out in the latter sections of this study.

For purposes of analysis three distinct kinds of concern can be distinguished: the federalist, the bilingual and bicultural questions which are of special concern to Quebec, and the general interest in the Supreme Court's capacity for national judicial statesmanship. While no doubt in practice there is considerable overlapping of these concerns, it seems worthwhile to consider them separately



for they raise different kinds of questions for research and point to different kinds of possible reform.

#### *A. Federalist Concerns*

From the perspective of federalism, the chief point of interest in the operations of a federal Supreme Court concerns its role of arbiter or umpire of the federal system. Advocates of "classical" or "pure" federalism argue that the institution which settles disputes between the constituent parts of the federal state and the national government should not, in principle, be subject to the exclusive control of either level of government. In the words of K. C. Wheare, one of the foremost expositors of the principles of federal government, "what is essential for federal government is that some impartial body, independent of general and regional governments, should decide upon the meaning of the division of powers."<sup>1</sup> As has already been noted above, one of the primary points of criticism raised by the Tremblay Commission, Quebec's Royal Commission on Constitutional Problems, was the contention that this principle was violated by the existing organization of the Supreme Court of Canada.

While this particular point of criticism might be taken up by any thorough-going adherent of "pure" federalism, it would appear that since 1949 only Quebec spokesmen have been prominent in expressing this argument. However it may be that the recent reluctance of a number of provincial governments to submit to the Supreme Court the question of whether jurisdiction over off-shore mineral rights is a provincial or federal concern stems, in part, from the same kind of distrust voiced by Quebec representatives.

The essential element in this distrust is the central government's control over the appointment and dismissal of Supreme Court judges. The inference which sustains this distrust is that judges who are appointed by the federal government and can be removed by the federal legislature, are apt to favour the federal level of government in federal-provincial disputes.<sup>2</sup> Presumably, although this is not spelt out by those who adopt this argument, the centralist bias would result from the kind of men a federal government is most likely to choose in making Supreme Court appointments, or else from the influence which the federal level of government might have on Supreme Court justices after their appointments. The latter suspicion would have to be based primarily on the informal rather than formal influence which federal agencies might exercise, for Supreme Court judges, once appointed, hold office on good behaviour and can be removed only by the Governor General on address of the Senate and House of Commons.<sup>3</sup> Still, this does mean that the federal Parliament possesses the exclusive power to remove Supreme Court judges. Also, there is the possibility that the conditions of tenure, because they are provided for in federal legislation, rather than in the Constitution, could be altered unilaterally by the federal legislature. Besides the rather remote possibility of the federal government influencing



the Supreme Court through the exercise of these legal powers, there is the larger possibility of the judges' outlook being shaped by the federal environment in which they work and live. But this kind of influence could not be overcome simply by altering the method of appointing Supreme Court judges.

It should be noted that provincial opposition to the central government's control over Supreme Court appointments and dismissals is not based on actual manifestations of the centralist bias which, it is alleged, such control might produce in the constitutional decisions of the Supreme Court. K. C. Wheare, the federalist expert, whose opinion has been cited here and is so often cited as grounds for the federalist critique of the Canadian Supreme Court, has commented on this point. After pointing out that "in most federal governments the settlements of disputes about the meaning of the division of powers is confided to a body appointed and dismissable by the central government," he goes on to observe that "in spite of the formal dependence of the supreme courts on the executive and legislature of the general government, they have exhibited a considerable impartiality in the exercise of their function as interpreters of the division of powers."<sup>4</sup> Whether or not Wheare's generalization holds true for Canada, one does not find that recent provincial critiques of the inherent centralist bias of the Supreme Court turn on real indications of this in the Court's decisions.

When one actually examines the Supreme Court's record in constitutional adjudication, one finds that in the one period when the Supreme Court was most vulnerable to the charge of favouring the federal government, this complaint was not a significant ingredient of public discontent with the Court. The period referred to was, of course, during the Court's earliest years when it had not yet become thoroughly controlled by Privy Council precedents and, in one or two instances as we pointed out earlier, when it had demonstrated a concern for upholding federal power, particularly in the field of trade and commerce. Following these early decisions and up to 1949, the Supreme Court's subordination to the Privy Council was such that it could scarcely be accused of having taken an initiative on the basic issues of constitutional law that was clearly centralist or provincial. There were, it is true, occasional instances when the Supreme Court, or at least some of its members, showed an independence of the Privy Council's modes of reasoning; but in their disagreements, the Canadian judges were, as often as not, on the provincial rather than the federal side.<sup>5</sup> What was surely more important than any of the concrete differences between the tenor of the Supreme Court's constitutional decisions and those of the Privy Council in shaping popular attitudes was simply the fact that the Privy Council, as the supreme arbiter of the Canadian constitution, was independent of both the provincial and federal governments. When you add to this the generally acknowledged tendency of the Privy Council's critical decisions to strengthen provincial powers, it is not surprising that provincial spokesmen, after 1949, might suspect that a final constitutional

arbitrator subject to exclusive federal control would tend to move in the opposite direction.

Since 1949, the Supreme Court has not embarked on a revolutionary departure from the Privy Council's approach to the division of powers. It is true that in the *Johannesson*<sup>6</sup> case a majority of the Court supported a less restrictive view of the federal legislature's general power than that developed by the Privy Council, and again the Court's judgments in both the *Ontario Farm Products Marketing Act Reference*,<sup>7</sup> and the *Murphy*<sup>8</sup> case, pointed to a larger conception of the federal trade and commerce power.<sup>9</sup> But, on the other hand, in a number of cases challenging provincial statutes, the Court was willing to uphold the provincial legislation and, in effect, carve out a larger area in which the provinces could act concurrently with the Dominion.<sup>10</sup> It may be true that in the post-1949 period the provincial legislatures have certainly had more of their Acts invalidated by the Supreme Court than has the federal Parliament. But this is more likely a reflection of the greater tendency of contemporary provincial régimes to venture into new spheres of activity than a reflection of a federal bias among the members of the Supreme Court. In any event, it is not the phenomenon which appears to have provoked federalist objections, especially in Quebec, to the Supreme Court.

Those objections, as we have stressed, are based primarily on the principle that federal equity demands either the supreme constitutional tribunal's complete independence of both levels of government, as was the case with the Privy Council, or else its bilateral dependence on both levels. Expressed not as a sense of distrust of the existing Court, but more as a positive proposal for strengthening the provinces' and particularly Quebec's confidence in the constitutional decisions of a Supreme Court, this position insists above all on provincial participation in the appointment of Supreme Court judges. A number of proposals have been made for implementing this principle. One approach is to have the provincial governments directly appoint or nominate some of the judges of the Supreme Court or of a special constitutional court.<sup>11</sup> Proponents of this scheme have usually contemplated that for this purpose the provinces be grouped in accordance with the regional divisions of the Senate. Of course, those in Quebec who have recently been pressing for a more dualistic constitution for Canada would go much further than this and insist that the part of Canada representing the French culture enjoy equal rights with the English section in selecting the members of the tribunal that interprets the constitutional compact.<sup>12</sup> But this position goes considerably beyond federalist concerns, for it entails a binational rather than a federal approach to institutional reform. A more indirect way of involving provincial representatives in the process of making Supreme Court appointments is to have one of the national institutions, most likely a reconstructed Senate, which is especially designed to represent provincial interests, have some power of ratification over Supreme Court appointments. Those federal states which place some restrictions on the central government's control over appointments to the highest constitutional court, namely the United

States and West Germany, use this type of mechanism.<sup>13</sup> Short of either of these approaches, there is another remedy which could be regarded as a minimal way of reducing provincial suspicions of federal control over the Supreme Court. This would entail inscribing some of the key clauses of the Supreme Court Act governing the appointment and tenure of judges—and possibly the jurisdiction of the court—in articles of the written Constitution not subject to unilateral amendment by the federal legislature. This extension of constitutional status to the crucial qualities of the Court might include the clause in the Supreme Court Act requiring that at least one-third of the nine Supreme Court judges be from Quebec.<sup>14</sup>

It is not our intention here to follow through all the implications of carrying out any of these proposals. Nor in our study of the Supreme Court's work since 1949 will we be paying special attention to its interpretation of the B.N.A. Act. These matters, as we have indicated, are more directly concerned with federal rather than bicultural issues. Only where the Supreme Court's constitutional decisions may impinge directly on a bicultural question, especially in the field of civil liberties, will the quantitative and qualitative analyses of the Supreme Court's decisions touch these federal matters. In addition, the detailed study of the Court's procedures will examine the representative character of the Court's composition, and this may shed some light on the Court's capacity for serving federalist values.

Outside the realm of constitutional law, the wide scope of the Supreme Court's appellate jurisdiction in ordinary areas of law raises another issue which may be a source of federalist discontent. The fact that from the very outset the Supreme Court has been vested with authority to hear appeals in cases dealing with matters subject to provincial legislative jurisdiction, as well as those falling under federal jurisdiction, has meant that there is no division of judicial authority paralleling the division of legislative powers in Canadian federalism. As we pointed out above, the Judicial Committee's decision in 1947 which removed any constitutional obstacles to Parliament's abolishing all Canadian appeals to the Privy Council, consolidated the unitary nature of Canada's judicial structure. This decision confirmed the federal legislature's power under Section 101 of the B.N.A. Act to assign final appellate authority in all legal matters—federal and provincial—to a federal appeal court created and regulated by the federal Parliament.

This failure to extend the federal principle from the legislative to the judicial sphere is not an unusual feature of federal states. Indeed, of the classical federal countries, only the United States comes close to having a dual system of courts, one set to apply and interpret federal law and another to apply and interpret state law. And even there, of course, the jurisdiction of each set of courts is far from being exclusive of the other.<sup>15</sup> It is difficult enough to classify the subject matter of a complex piece of legislation under national or local heads of power. It is much more difficult, again, to take the myriad questions which crop up in all the lawsuits which



are constantly being fed into the country's system of courts and sort them into matters coming under national or local spheres of jurisdiction. Certainly any attempt to work out a federalist division of jurisdiction in handling a country's legal disputes would be bound to confront some enormously complex jurisdictional tangles.

In Canada, those who have favoured a division of judicial jurisdiction closer to the federal division of legislative powers have usually only gone as far as to propose cutting off appeals from provincial courts to the Supreme Court in cases which involve only provincial law issues. This proposal, it should be noted, would not go very far towards realizing a federal division of judicial authority. It would leave the provincial courts with original jurisdiction over most aspects of federal law; for ever since the decision was taken in the first few years after Confederation not to press ahead on a large scale with the development of additional federal courts for the enforcement of national laws, the national legislature, like its counterpart in Australia and Switzerland, has relied mainly on provincial courts for the application of its laws.<sup>16</sup> There is no indication that even the staunchest federalist would be interested in reversing this trend; nor, at this stage in the country's history, that he would call for the establishment of what would have to be a very extensive system of federal courts to deal with all disputes—including the broad fields of criminal and commercial law, which are affected by federal legislation. Besides this, the federal pattern of organization is further violated in the Canadian judicial system by the fact that the national government appoints all the judges of the Superior, District and County Courts in the provinces.<sup>17</sup>

It may be that this latter point raises the element in the existing system which is most vulnerable to the federalist point of view. A fairly large degree of overlapping in the jurisdiction of regional and national courts is probably an inescapable feature of a workable federal system. But exclusive national control of all senior judicial appointments—at both national and provincial levels—is not. K. C. Wheare, for example, after acknowledging the compatibility of the former situation with federalism, goes on to state that "on the other hand, the case of Canada, where the appointment of all judges is in the hands of the general government, is an example of a system which contradicts the federal principle."<sup>18</sup> The substantial responsibilities of provincial judges in federal law matters make some federal participation in their appointment appropriate. By the same token, it could certainly be argued that provincial governments should be involved in the appointment of all provincial court judges and, possibly, on the basis of the same logic, in the appointment of those federal judges (i.e., of the Supreme Court of Canada) who have a final appellate control over provincial law matters. An incidental benefit of such an approach might also be the removal of fetters on the development of provincial administrative tribunals which the judicial construction of Section 96 of the B.N.A. Act has imposed on the provinces.<sup>19</sup>



Again we must stress that the research we have carried out on the Supreme Court's development since 1949 does not bear directly on the federalist critique of the Court's jurisdiction over provincial law matters. What we have been aiming at here is simply to untangle the principal points of view from which the Supreme Court might be evaluated in order to single out the particular aspects of the Court that are related to bilingual and bicultural considerations. As for the relationship between the federalist concerns which we have discussed, and the bilingual and bicultural questions which we deal with below, two points should be made. First, the issues raised by federalist criticism of the Supreme Court are taken up mainly by Quebecers. We have already noted this fact in relation to the Supreme Court's role as a constitutional umpire. Again, in relation to the Supreme Court's review of provincial law matters, not too many outside of Quebec would be apt to argue that "because of the greater familiarity of local judges with the relevant social context,"<sup>20</sup> provincial judges should control the shape of the law in crucial fields of provincial law. This argument obviously has special relevancy to Quebec with its very distinctive private law system. And, indeed, the desire for some degree of legal uniformity, which is the point most often made for the retention of national appellate review of provincial law questions, is likely to be least convincing to Quebec opinion.<sup>21</sup> The second point, however, that should be made about the relationship of federal to bicultural concerns, is that the very fact that the points of criticism raised by a federalist analysis of the Supreme Court have the largest following in Quebec, and indeed tend to spill over into the special concerns of French Canadians in Quebec, suggests that one way of dealing with the special concerns of Quebec would be to adopt general federal solutions. Although it is clear that if such a course were adopted and all the provincial governments were given a voice in judicial appointments; or all appeals to the Supreme Court in matters relating to "property and civil rights," were terminated, it is likely that such measures would be regarded as far more meaningful in Quebec than in any of the other provinces.

### *B. Bicultural Concerns*

Besides evaluating the Supreme Court in terms of federal principles, the position of the Court can also be examined from the point of view of French-English relations in Canada. In so far as the interests of French culture in Canada are represented by Quebec, then, to that extent the federal concerns which we examined above might overlap and contain the bicultural needs and aspirations of French Canada. But it also seems worthwhile, one might even say mandatory in the context of the Royal Commission on Bilingualism and Biculturalism for which this study was undertaken, to isolate for detailed study those aspects of the Court's contemporary organization and work which have a direct bearing on bicultural questions. When

this is done, it is possible to distinguish three distinct areas of investigation: bilingualism in the Court's proceedings, the dualism of private law systems (the English common law and the Quebec civil law), and the broader clash of cultural values along a bicultural axis. Most of the quantitative and qualitative examination of the Court's decisions since 1949, which we have undertaken, focused on various phases of these issues. But as a preface to our report of that study, we wish to state the questions which seem paramount in each of these areas.

First, as far as bilingualism in the Supreme Court is concerned, the main contention is simply that since only three of the nine Supreme Court judges come from Quebec, it follows that the majority will not speak or understand French well enough to give French-speaking counsel the same opportunities to use their first language before the Court as English-speaking lawyers enjoy. The Junior Bar Association of Montreal's brief to this Commission presents a contemporary expression of this viewpoint. After concluding that "the Courts and Board of Quebec, especially in the Montreal area, are satisfactorily bilingual," the brief continues as follows:

A similar situation however does not exist in the federal courts. Despite Section 133 B.N.A. (1867) which permits a French speaking lawyer to use his own language before the Courts, this in fact has not been possible or practical. Up to the present, the majority of judges on the Supreme Court could not understand French. If a lawyer wished to convince the judges, he would have to draft his *factum* in English and argue in English. This was necessary if he was to serve the best interests of his client. On the other hand, there has never been a French speaking judge on the Supreme Court who could not understand and speak English. It seems that bilingualism has been a requirement for French speaking judges but not for their English speaking counterparts.<sup>22</sup>

This charge will be investigated in the first part of our detailed study. The extent to which both languages are and can be used in the Court's proceedings and records will be examined. In the light of this examination, possible methods of increasing the bilingual quality of the Court will be considered. Finally, in looking at the Court's decisions since 1949, we shall single out any cases in which the legal issue before the Court has confronted the Court with a bilingual problem, and see how the Court has treated such problems.

It should be noted here that the complaint about the difficulty of using French in the Supreme Court has customarily been much less significant than anxiety about the Supreme Court's effect on Quebec's legal culture. In the historical narrative we traced the early expressions of this protest when there was some tendency to assume that the members of the Judicial Committee possessed a higher degree of linguistic versatility than the English-speaking members of the Supreme Court. However, with the passing of time, much less was heard of this complaint and French Canadian opinion focused more on the question of legal biculturalism. But this latter concern cannot, as

Girouard argued over 75 years ago,<sup>23</sup> be entirely separated from the question of bilingualism. If one wants to preserve Quebec's civil law as a distinctive system of private law, enriched by the great body of French legal doctrine that is associated with that legal tradition, then it is likely that the pursuit of such a goal requires a bar and a bench capable of mastering and contributing to the French-language scholarship which sustains that legal system. It is at this point that the linguistic capabilities of the judges who sit on the final court of appeal might well be a critical factor in the over all influence which that court has on Quebec's civilian jurisprudence.

The fate of Louisiana's French<sup>24</sup> civil-law system may be instructive on this point for those concerned about the preservation of Quebec's system. There seems little doubt that without any formal legislative change, Louisiana's civil-law system has over the years been very thoroughly impregnated with common-law influences, so that it is now possible for a competent student of that system to conclude that "it must be admitted that Louisiana is today a common law state."<sup>25</sup> Now in Louisiana's case, the erosion of its distinctive legal tradition cannot be traced to the federal Supreme Court's ultimate appellate authority over that system, for with the dual system of courts operating in the United States, control over the interpretation of Louisiana's civil code would, for the greater part, rest in the hands of local judges. But on the state level, the absence of a pervasive French culture has been one of the most obvious factors at work in the Anglicization of the state's legal system. Professor Ireland in his study of the evolution of Louisiana's legal system, reports that "use of the French language before and by the courts though perhaps not unlawful, has been unheard of for many years, and three-quarters of the bar of Louisiana are probably unable to read the French commentators in their own tongue."<sup>26</sup> Another Louisiana jurist, Sidney Herold, anxious to see Louisiana retain its unique legal system, insists that its bar and bench must be able to read French sources of their code on the grounds that "one cannot know the history and background of the Articles of the Louisiana Code without at least a working knowledge of reading French."<sup>27</sup>

In Quebec there has been little anxiety as to the extent to which French sources are taught in its law schools and used by members of the provincial bar and bench. However, if the charge referred to above were well founded so that not only were a majority of the Supreme Court's members unable to mine French sources, but also French Canadian lawyers were discouraged from citing such sources before the Court, then the experience of Louisiana might well be regarded as a warning signal to French Canadian jurists concerned about preserving the purity of their legal system. But a careful investigation of the influence which the linguistic limitations of the Supreme Court might have on Quebec's system of civil law, would have to go beyond the mere study of the Court's procedures and personnel. It would require above all an extremely painstaking examination of the Court's jurisprudence in relation to the Civil Code, which would far exceed the capacities of this project. Nevertheless, this relationship between



the use of language in the Court and the Court's impact on Quebec's Civil Code, must be acknowledged as a possibility, even if it is one upon which this particular study cannot shed much light.

Turning to the second area of bicultural concern—the Supreme Court's treatment of the dualism of common law and civil law—we confront what has undoubtedly over the years been the most persistent source of Quebec discontent with the Supreme Court. In the historical section we traced how as early as the Confederation Debates French Canadians voiced their fear that the vesting of the highest appellate powers over all matters of law, including the civil law of Quebec, in a Supreme Court containing a majority of common-law judges, would eventually result in the large-scale infiltration of common-law principles into Quebec's civil law. At all the stages of debate through which the Supreme Court has passed right up to the present day, this has continued to be a main theme of French Canadian criticism of the Court. It has usually stimulated the advocacy of two alternative types of reform: either the termination of all appeals from Quebec courts to the Supreme Court in cases dealing with the Civil Code (or more broadly with property and civil rights in the province); or else, as an alternative approach, the reorganization of the Supreme Court to ensure that in all such Quebec appeals the civilian judges on the Court have a controlling voice.

Our study of the Supreme Court's decisions touches on this critical question in two respects. In our quantitative analysis we have attempted to provide simply a statistical account of the degree to which the non-civilian members of the Court have played a decisive role in Quebec appeals during the various periods of the Court's existence. In the section following this which presents a more jurisprudential analysis of leading cases, we examine, among other things, some of the recent cases in which the Court has divided on the lines of civil law and common law in matters relating to Quebec's civil law. These parts of our research, it is hoped, will provide some indication of the over-all weight which common-law judges have had in reviewing the decision of Quebec judges, and provide some illustrations of the kind of Quebec lawsuit which might pit the common-law judges on the Court against their civilian brethren. Obviously, however, it cannot pretend to provide anything approaching a definitive assessment of the common-law influence on Quebec's civil law which has resulted from the Supreme Court's exercise of its appellate authority. Such an assessment would have to be based on an extensive examination of the way in which the Supreme Court has shaped Quebec's civil law—both in terms of substantive legal precepts and general judicial techniques. In order to isolate and comprehend the Supreme Court's influence such a study would have to compare the Supreme Court's own contribution to Quebec law with that of the Privy Council and that of the Quebec courts themselves. Already a number of French Canadian scholars have made substantial contributions to this kind of study, but there is still much that remains to be investigated.<sup>28</sup>

While this detailed legal scholarship is unquestionably the indispensable step in revealing the full extent of common-law influences



on Quebec's civil law, what perhaps is too often left out of account are the alternative ways of *evaluating* this influence once it is revealed. Of course, one's objection to the Supreme Court's review of Quebec decisions dealing with civil-law matters may be based primarily on principle. One might argue that regardless of the actual ways in which the Supreme Court's treatment of civil law has affected Quebec society and changed its legal culture, it is wrong in principle to give a federal court, containing only a minority of Quebec judges, the power of revising the decisions of Quebec courts in matters relating to Quebec's distinctive system of private law. From this point of view, the citation and analysis of actual cases can only provide corroborating evidence for an already well-formed judgment. At the level of popular, political discourse this rather ideological attitude to the question has been most prevalent.

It is possible, however, to take a more pragmatic approach which requires a close study of actual judges and actual cases. To begin with, one would want to ascertain, more carefully than has been done to date, the extent to which common-law judges lack competency in handling civil-law matters. It may be that given appropriate methods of consultation and collaboration on the Court, plus enlightened appointments, Supreme Court judges not formally trained in the civil-law tradition can, in a reasonably short period of time, acquire enough knowledge to justify their reviewing the judgments of the highest Quebec court. Secondly, once the particular forms of common-law influence on Quebec's civil-law system are ascertained and traced to Supreme Court judges, a number of further questions might be asked. How have these "distortions" of Quebec's Civil Code affected the particular rights of Quebec litigants and, more generally, legal relations in Quebec society? Are these effects just or unjust, beneficial or adverse? Is there a "comparative law advantage" in any of these common-law infiltrations of the Civil Code? On the other hand, has the presence of civilian judges on the Supreme Court had a counter-balancing effect on the law of the common-law provinces? Again, have these been beneficial effects? Of course, the answer to any of these questions must hinge on the values one holds both in relation to various areas of social policy as well as in relation to alternative patterns of legal development. But the point is that once the discussion of the Supreme Court's impact on the civil law of Quebec passes the essentially ideological point, they are questions which can only be answered candidly by first defining the values and premises upon which one's answers will be based.

The third area of bicultural concern which we have defined revolves around those legal issues which come before the court and which would, at least potentially, appear to turn on a conflict of French as opposed to English values. Since 1949 a large number of cases have been brought before the Supreme Court involving potentially bicultural issues in such areas as family relationships, morals, religious beliefs, education, and civil liberties. A number of these cases, especially in the field of civil liberties, have concerned questions of great public importance. Many of them have been appeals

from decisions of the Quebec courts and, in some of the most prominent of these cases, the Supreme Court of Canada has reversed the decision of the Quebec courts. All of this has produced a heightened awareness of the possibility of bicultural conflicts across a broad range of legal issues adjudicated by the Supreme Court.<sup>29</sup>

Our research on the Supreme Court's post-1949 decisions has tried to ascertain the extent to which this possibility is an actuality. In the quantitative part of our study we have first carried out a comparison of the Supreme Court's disposition of Quebec appeals in various categories of legal issues with its disposition of appeals from the other provinces. Also, by analyzing voting patterns we have tried to see whether or not ethnic blocs are operative in the Court's decision-making. Secondly, we have looked closely at a variety of cases in which there would appear to be at least a possibility that differences among the judges might hinge on differences in their ethnic or religious backgrounds. In these cases we have endeavoured to answer two questions: a) is there any evidence in the judges' opinion to suggest that their ethnic or religious attitudes have been a significant factor in influencing their conclusions? b) where judicial disagreements do appear to reflect French-English, or possibly Roman Catholic-Protestant differences, how has the Court resolved these differences?

One crucial point should be made here as a qualifying note to the general public discussion of bicultural divisions on the Court and to our investigation of this matter. In this area of discourse, it may be too readily assumed that the Quebec judges on the Supreme Court, or at least the French-speaking Quebec judges, represent French Canadian cultural values. It may also be questionable to assume that judges who sit on Quebec's Court of Appeal, and whose decisions can be reversed by the Supreme Court, are also representative of French Canadian culture. Neither of these assumptions may be correct. If we set aside the whole problem of identifying a French Canadian (or for that matter, an English Canadian) consensus on the values involved in these "bicultural" lawsuits, and assume that something approaching a prevailing French Canadian attitude to these issues exists, it still does not necessarily follow that Quebec judges share and apply these prevailing attitudes. Indeed, given a) the fact that the federal government appoints both Quebec provincial judges and Quebec judges on the Supreme Court, and b) the fact that once appointed Quebec judges usually remain on the Court until retirement at age 75, it is possible that these Quebec judges in their basic value orientations might be quite out of step with the prevailing tone of French Canadian society in Quebec—particularly at a time when that society is passing through a very dynamic period of social change.

Even if this were the real situation, and Quebec's representatives on the Supreme Court, or even her own provincial judges, were in a significant way unrepresentative of the main stream of her cultural life, this in itself might not diminish the seriousness from a bicultural point of view of the recent divisions on the Supreme Court

on important bicultural issues. The very fact that such issues come before the Court and seem from their very subject matter to embrace questions upon which the country's two major cultural groups have different attitudes, might in itself suggest to the exponent of bicultural equality that the Supreme Court's structure should be seriously reformed. The obvious directions that such reform would take would be to organize the Court so that, at least in dealing with those areas of law sensitive to a bicultural division of opinion, French Canadian judges are equal in number to English Canadian judges. Also, if one were concerned about the degree to which French Canadian or Quebec judges now represent the prevailing values of their society, one might advocate altering the system of appointment or tenure to ensure that such judges are more truly representative.

### *C. The Search for Judicial Statesmanship*

Since 1949 a number of professional commentators, especially in English-speaking Canada, have expressed a desire for the Supreme Court to play a more creative and statesmanlike role in developing Canada's legal system. This feeling embraces a number of different points of view and focuses on a number of different aspects of the Court's behaviour. Although the considerations which this body of opinion entails are not per se concerned with bicultural or bilingual questions, they do raise issues which must be taken into account in appraising the Court's capacity for dealing with such questions.

The three phases of the Court's performance on which this general current of thought has focused most frequently are its adjudicative posture, its decision-making techniques, and the character of its work load or docket. While each of these aspects is a large subject in itself, a few general remarks on each in turn may be worthwhile here, in order to indicate what, from a rather professional, as opposed to a federalist or bicultural point of view, might be regarded as some of the Court's shortcomings as the country's highest judicial organ.

The most common point of criticism within this frame of reference is what is considered to be the overly conservative character of the Court's adjudicative posture. In particular, the jurists of the Supreme Court are accused of having adopted too rigid an adherence to the principle of *stare decisis*, and too narrow a conception of the principle of legislative supremacy and the constraint which that principle imposes on their own law-making functions. Dean Horace E. Read, in a perceptive study of the judicial process in common-law Canada, concluded that "in the first half of the twentieth century the rigor of *stare decisis*, and the doctrine of legislative supremacy as applied in Canada, combined to produce a static and mechanical operation of law."<sup>30</sup> While Dean Read applied this indictment to all of the courts in common-law Canada, he and those who share his view, have looked to the newly emancipated Supreme Court to lead the way



towards the development of a more creative and, for Canadian society, a more appropriate style of jurisprudence.

It has been easier for this body of critics to state what they find wanting in the Supreme Court's traditional pattern of adjudication than it is for them to indicate the precise ways in which these shortcomings might be overcome. The one common expectation or hope that they share is that the Supreme Court, now that it is at the apex of Canada's judicial structure, will adopt Canadian law more effectively to the changing needs of Canadian society. Such a wish stems directly from the main grounds for advocating judicial autonomy for Canada. The minimal requirement for the fulfilment of this hope is that the Supreme Court would be willing to diverge from English decisions when by doing so it could adjust the law more appropriately to changing Canadian circumstances. Gilbert Kennedy echoed the feelings of many thoughtful Canadian lawyers when, in 1955, after criticizing the Supreme Court for a particularly uncritical adoption of an English precedent, he went on to say: "May I suggest that our Supreme Court faces the very great challenge to develop over the next few years, not merely the law in a few individual cases, but the approach to law in this country for years to come? Any attitude which ties us blindly to the House of Lords is, I suggest, merely the green light for a continuance of the stagnation in Canadian legal thought and development of which many of us are all too aware."<sup>31</sup>

But beyond this general injunction to avoid a stultifying subservience to *stare decisis* and develop a more distinctive Canadian jurisprudence, it is not easy to state in precise terms the necessary ingredients of the desired judicial approach. What is called for is, above all, a state of mind in which the Court fulfils its function of making the law, as distinguished from merely applying it. Those who subscribe to this general position are quick to insist that they do not wish to see the Court usurp the position of the legislatures. But their basic contention is that in the process of adjudicating disputes by applying the law to particular instances, the Supreme Court, like any other court will, by virtue of the ambiguities, generalities or silences of the statutory laws or precedents, be forced to make law, at least in the sense of applying established legal rules to unforeseen circumstances. When this occurs what is advocated is that the Court acknowledge the significant discretionary power which is inescapably thrust upon it, and seek not only the most appropriate modes of legal reasoning, but also knowledge of the most relevant kinds of social facts which might enable it to act wisely.<sup>32</sup>

At a more practical level of criticism, the actual techniques and procedures followed by the Supreme Court in its decision-making process have been found by some to reduce seriously the Court's capacity for providing Canada with effective judicial leadership. Two related aspects of the Court's methods have caused most of the adverse comment—the lack of consultation in the process of arriving at decisions, and the Court's custom of *seriatim* opinion writing. On the first point, what is advocated is a more systematic use of judicial conferences in order to seek a consensus, or, where that is



impossible, to identify clearly the significant points of difference. The absence of sufficient collaboration in decision-making would appear to be the main reason for the practice, in many cases, of individual judges writing their own judgments, even when there are no major points of difference between the various opinions. This practice is criticized on the grounds that it results either in mere repetition, or worse, in hopeless confusion, if it is impossible to identify one line of reasoning adhered to by a majority.<sup>33</sup>

Finally, it can also be argued that the commonplace character of the bulk of the Supreme Court's business mitigates against the Court's assuming a role of distinctive judicial leadership. Only a small minority of the cases which come before the Court are likely to raise legal issues of fundamental importance to the country. Most of its work load concerns rather mundane points of law which arise in private lawsuits. This is principally the result of the statutory rules governing the Supreme Court's jurisdiction, and the Court's own treatment of those rules.<sup>34</sup> In particular, the provision of appeals as of right in cases involving over \$10,000 accounts for at least half the cases on the Supreme Court's docket, and thus has a decisive effect on the nature of the Court's work load.<sup>35</sup> On the other hand, in some instances where important questions of civil liberties have been at issue, the Court has assumed a rather restrictive attitude with regard to its own powers of granting special leave to appeal.<sup>36</sup> Unlike the United States Supreme Court, which by carefully selecting the cases it will hear, confines its attention to cases which raise questions of great significance, mainly in the public law field,<sup>37</sup> the Canadian Supreme Court exercises relatively little control over the shape of its own docket, and spends far more of its time dealing with technical points of "lawyer's law" than with questions of larger public concern.

What should be borne in mind with regard to the points which we have very briefly canvassed here is that they represent another vantage point from which the Court's capacity for dealing with both bicultural and federal issues might be appraised. The conservative style of the Supreme Court's jurisprudence means, at the very least, that the Court's judgments on important questions touching bicultural or federal relations have usually been phrased in a technical, legalistic manner, making it difficult to detect any real policy choices which the Court may have confronted. The lack of systematic consultation and discussion in decision-making has likely reduced the opportunities for negotiating agreements between judges representing different values or traditions, so that the outcome of a case has simply been determined by mechanically adding together the separate conclusions of individual justices. And the relatively shapeless, undistinguished nature of the Court's work load has not conditioned either the Court's bench or its public to recognize the Court's function in determining questions which have an important bearing on French-English or federal relations.

It would take us far beyond the bounds of this study to investigate the possible reforms to which this mode of analysis might point.

What should be noted is that any steps taken to increase the Court's capacity for concentrating in a deliberate way on the settlement of legal issues touching questions of great public importance are likely to intensify bicultural or federal concern about the Court. Indeed, it may be that the very judicial conservatism, which the Court's realist critics have attacked, by hiding the real value cleavages implicit in some areas of the Court's work, has muted these sources of anxiety. Now as legal realism becomes a more pervasive outlook, it is likely to produce a heightened sensitivity to the role which the background and social assumptions of judges might play in shaping their decisions. This, in turn, is apt to make French Canadian or federalist critics of the existing Supreme Court set-up more eager for something approaching bicultural or federal-provincial parity in the composition of the Court, particularly if the Court concentrates on those areas of law in which the opportunities for judicial law-making are numerous and prominent.

### *A. Composition of the Supreme Court*

In order to understand the bilingual and bicultural qualities and capacities of the Supreme Court we must gain some idea of how the Supreme Court is composed. Our approach in this section will be to look first at the legal and well-established, conventional principles which govern both the selection of Supreme Court judges and the division of labour among the Court's members. We shall then go on to explore some of the less obvious factors which appear to have affected the recruitment of Supreme Court justices. Finally we shall set out the most relevant information regarding the Court's non-judicial administrative staff.

#### *1. Statutory requirements*

The statutory requirements appertaining to the composition of the Supreme Court can be summarized in a few words. These rules are all contained in the Supreme Court Act.<sup>1</sup> First of all, they vest in the Governor in Council the power of appointing the Chief Justice and the eight ordinary or puisne judges who make up the Court. Two restrictions are legally imposed on the Government's own choice of these judges: a) the appointee must either have been a judge of a superior court of a province or have had ten years' professional experience as a lawyer; and b) at least three of the judges must come from either the superior courts or the bar of Quebec. Once appointed a judge is prohibited from holding any other office of emolument, either federal or provincial. The judges are required to reside in Ottawa. They hold office during good behaviour, and are removable by the Governor General on address of the Senate and House of Commons. A judge must retire upon reaching the age of 75.<sup>2</sup>

All of these rules are merely statutory. There are no constitutional guarantees governing any aspect of the Supreme Court's composition. Thus, for instance, the requirement that one-third of the Court must come from the bar or bench of Quebec is subject to unilateral amendment by the Canadian Parliament.

## *2. Bicultural and bilingual aspects of membership*

It is this latter rule requiring a minimum of three Quebec judges which is most relevant to our interest in the bilingual and bicultural characteristics of the Court. As we have seen in the historical section of this study, the precursor of the existing rule was the provision, inserted in the first Supreme Court Act in 1875, requiring that at least two of the six Supreme Court judges come from Quebec.<sup>3</sup> In 1927, when the Supreme Court's membership was increased from six to seven judges, the minimal requirement for Quebec representation was not altered.<sup>4</sup> However, in 1949 when the Court's make-up was changed once again, this time to a nine-judge court, the Quebec requirement was raised to three.

The reasoning behind this special provision for Quebec representation on the Supreme Court's bench has always been based, primarily, on the bicultural dimensions of the Supreme Court's case load. The requirement of a minimal number of judges drawn from the bar or bench of Quebec has been regarded as necessary to ensure that there would always be some civilian jurists available to hear those appeals from Quebec which involve the application of Quebec's distinctive system of civil law. An analogous system is followed in Great Britain where the House of Lords as the United Kingdom's highest court of appeal hears appeals from Scotland whose local law, like Quebec's, is not common law, but rather is derived from the civil law tradition. By convention, some of the law-lords in the House of Lords are always appointed from Scotland. However, as with the Quebec jurists' participation in the Supreme Court's decision-making, this arrangement has not given the Scottish judges the balance of power in cases appealed from Scotland, nor has it muted the protests of Scottish jurists against the adulteration of Scottish law by the common-law majority of the House of Lords.<sup>5</sup>

The 1949 increase in the legal requirement for Quebec representation from two to three judges was specifically justified as a means of avoiding a deadlock between the Court's civilian jurists. The Minister of Justice, Stuart Garson, gave the following explanation of the change:

We knew that when we created the Supreme Court as the court of last resort for Canada we would have to have appointed to the membership of that court enough civilians or judges trained in the civil law so that, in the event of there coming from Quebec a case involving any matters other than criminal law, it would be decided without a stale-mate, having one civilian judge on one side and one on the other. That necessitated the appointment of three judges trained in the civil law on that court of last resort.<sup>6</sup>

Mr. Garson's reasoning is perplexing. It is difficult to understand why the Supreme Court's becoming the final court of appeal for Canada should, in itself make it more desirable to have an odd rather than an even number of civilian judges on the Court's bench. Moreover, with a minimum of five judges required for every case it would still



be possible for one civilian judge allied with two or more common-law judges to defeat the two other civilian judges in decisions involving Quebec's Civil Code. Still it must be acknowledged that the 1949 addition of one Quebec justice did make it possible, for the first time, to have a majority of civilian jurists sitting for a Quebec appeal. In the final section of our quantitative study in Chapter IV we shall examine in detail the extent to which this increase in Quebec representation actually led to an increase in the civilians' control over the outcome of the various categories of Quebec appeals.

One other reason supporting the special provision for Quebec representation on the Court is that such a provision might be looked upon as making it more plausible that French-speaking litigants would in fact enjoy the right to use French when pleading a case in the Court—a right guaranteed to them by Section 133 of the B.N.A. Act. However, the bilingual explanation of the statutory requirement for Quebec representation makes less sense than the bi-legal explanation. There can be no doubt that any judge appointed from the bar or bench of Quebec will be trained in Quebec's system of civil law. However, as the 1954 appointment of Mr. Justice Abbott demonstrates, a Quebec appointee need not be a person whose first language is French. There is another point which is of even more fundamental importance! While the Quebec requirements of the Supreme Court Act have meant that at least two or three judges are fluent in French, on the other hand all of the Court's members have always been fluent in English. Given this hard reality, despite the required presence on the Court of several French-speaking jurists, any lawyer appearing before the Court who wanted to ensure that all the judges hearing his case would be able to follow this argument as closely as possible, would be well advised to plead his case in English.

Later in this chapter we shall explore in some detail the procedures and forms used in the Court with a view to discovering the degree to which the Court operates in a truly bilingual way. As a preface to that study we wish to comment here only on the bilingual capacity of the Supreme Court's membership. The fundamental limitation of the Court's bilingualism has already been noted; while fluency in English appears to have been a necessary qualification for membership on the Court's bench, fluency in French has not. That is not to say that all of the Court's English-speaking members have come to the bench lacking any knowledge of French. Some of the English-speaking judges have certainly been highly proficient in the French language. Justice Strong, for example, who was one of the first two Ontario appointees and who became Chief Justice in 1892 was reputed to be well versed in French jurisprudence. The *Canada Law Journal* cited his "Knowledge of the civil law and familiarity with the French language"<sup>7</sup> as a major reason for applauding his appointment. Another English-speaking Chief Justice, Francis Anglin, also came to the Court with a considerable knowledge of French, having been educated at St. Mary's College, Montreal and at the University of Ottawa. While other English-speaking justices have had the barest understanding of French when first appointed to the Supreme Court, many through

experience and often by means of professional tutoring have improved their French greatly while serving on the Court.<sup>8</sup> Certainly, as a minimum, we could assert that all the Court's English-speaking judges have been able to read French texts.

In our research, we have not gone back into history to examine the linguistic capabilities of all of the Court's previous English-speaking members. However we might refer, very briefly, to the linguistic capabilities of the present English-speaking members of the Court in order to give a clearer indication of how well equipped is the Court's current personnel in the two languages. To begin with, no one would contest the statement that not one of the seven judges whose first language is English (Justices Abbott, Cartwright, Hall, Judson, Martland, Ritchie and Spence) are as thoroughly bilingual as are their two French-speaking colleagues, Chief Justice Taschereau and Justice Fauteux. This view is bolstered by our inspection of the Supreme Court's reported decisions over the last 15 years which reveals that, with the exception of Mr. Justice Abbott's two-page opinion in *Chaput v. Romain* [1955] S.C.R. 834, none of the Court's English-speaking members has written judgments in the French language. However, all of these judges have shown enough familiarity with the French language to quote from judgments written in French or interpret documents written in French.<sup>9</sup> The one exception to this last statement, as of the end of 1964, was Mr. Justice Hall. But this is probably a misleading exception, for we must bear in mind that Justice Hall's term on the Court has been very short. Moreover, when we note that he was born in Quebec and in recent months has been frequently included among the judges hearing Quebec appeals, Justice Hall might well be regarded as considerably more bilingual than two or three of his English-speaking colleagues. On the other hand against these isolated citations of French-language sources by English-speaking judges, we must set the fact that the French-speaking members of the Court have on numerous occasions rendered their judgments in English.

In Table III.2<sup>10</sup> we have divided the Supreme Court's reported cases which have come on appeal from the provinces during the years 1950-64 into four columns based on the four regional lists used in organizing the Court's docket. For each judge who served on the Court during those years we have shown the percentage of cases from each region in which he has participated. The judges have been listed according to the regions from which they have been appointed. If we look at the figures in the second column showing participation in Quebec appeal cases, we can see somewhat higher levels of participation recorded for those judges who, by virtue of their background or experience and training acquired since joining the Court, have achieved a higher degree of facility in French than their other English-speaking colleagues. Justice Abbott's very high level of participation is, of course, primarily attributable to the fact that he is a civilian jurist. But still, having grown up in Quebec, with an educational experience which includes a year at Dijon University in France and having been involved in hearing several hundreds of Quebec appeal

cases, he has certainly achieved a relatively high degree of proficiency in French. Also, of the other current English-speaking Supreme Court justices who have frequently participated in Quebec cases, Justices Cartwright and Judson have both shown a fairly thorough comprehension of French. On the other hand, these figures do not suggest that a very low level of proficiency in French has ever barred English-speaking judges from participating in Quebec appeals. The lowest level of participation is 25 per cent. Consequently, we can be sure that in many Quebec appeals where oral arguments are presented in French, judges are present who would have some difficulty in following the presentation of a case and who could only question French-speaking counsel through the medium of their thoroughly bilingual colleagues. There may be, in addition, a great many cases in which Quebec lawyers whose first language is French present their case in English in order that they may be understood by the full bench before which they must plead. This is one of the points which we will examine more fully when we discuss the results of a questionnaire administered to French-speaking Quebec lawyers who appeared before the Court in recent years.

### *3. Regional representation*

Besides the statutory rule governing Quebec's representation on the Court, there is a well-established series of precedents amounting now to an unwritten constitutional convention concerning the representation of other regions on the Supreme Court bench. The key to this convention is a maxim which flows from the seemingly irresistible demands of Canadian federal politics: Ontario must have at least as many places as Quebec. Thus, as we have seen, when the Court was first established two positions went by law to Quebec, two to Ontario, and the remaining two to the Atlantic provinces.

Table III.1 shows the different patterns of regional representation through which the Court's composition has moved since 1875. It will be noted that up until 1927 when a seventh judge was added to the Court the principal deviations from the initial pattern were at the expense of Maritime representation. The first Western judge, Justice Killam of Manitoba, replaced an Ontario judge, but this regional distribution lasted only from 1903 to 1905. From 1906 to 1924, the Western and Maritime regions shared two positions on the Court and from 1924 to 1932 there was no one from the Atlantic provinces on the Supreme Court bench. In 1932 when Justice Crocket of New Brunswick replaced Justice Newcombe of Ontario, the seven-judge court settled down to a consistent pattern of two justices from each of Ontario, Quebec and the Western provinces and one from the Atlantic provinces.

The addition of two more judges to the Court in 1949 was prompted in part, as we have seen, by the desire to have three civilian jurists available for Quebec appeals. The Minister of Justice, Mr. Garson, explained the need for the other non-Quebec addition in terms of the increased amount of business which it was anticipated would come before the Court now that it was Canada's final court of



appeal.<sup>11</sup> He denied that this place on the court would necessarily be occupied by an Ontario judge, and suggested that the occasion might even arise when it would be desirable to fill a vacancy on the Court with a fourth Quebec judge if he was the most outstanding candidate for the position. Indeed, it was the essence of Mr. Garson's position that geographic considerations must not prevent the government from appointing the most qualified jurists to the Supreme Court bench. "It is desirable," he said, "that in appointing members to this court first regard should be had to their capacity to discharge their judicial duties. If we can have geographic representation consistent with that policy of appointment so much the better. . . ."<sup>12</sup> Since Mr. Garson made this statement in 1949 seven changes have been made in the Supreme Court's membership without disturbing the pattern of geographic representation established in 1949 of three judges from Quebec, three from Ontario, two from the Western provinces and one from the Atlantic provinces. Whether or not this fidelity to the representational pattern has been achieved at the expense of Mr. Garson's first priority of professional talent, must remain a matter of conjecture.

It certainly makes more sense to explain the representational pattern we have traced as a response to political pressures than as a device for strengthening the jurisprudential qualities of the Court. It is entirely possible that geographic considerations might unduly

Table III.1

Regional representation on the Supreme Court, 1875-1965

Year*	Quebec	Ontario	Atlantic provinces	Western provinces
1875	2	2	2	0
1888	2	3	1	0
1893	2	2	2	0
1903	2	1	2	1
1905	2	2	2	0
1906	2	2	1	1
1924	2	3	0	1
1927	2	3	0	2
1932	2	2	1	2
1949	3	3	1	2

\*The years listed are years in which an appointment to the Supreme Court altered the pattern of regional representation.

restrict the federal government's freedom of choice in selecting Supreme Court justices. And even if we concede that there is some justification for a representational system designed to place on the federal appeal court jurists who have a special knowledge of legislation and local conditions in the country's federal divisions, it is impossible to fit the existing pattern of representation on the Canadian Supreme Court within this rationale. As the Court is now constituted the two central provinces, Quebec and Ontario, have six of



the nine places on the Court, with the other eight provinces sharing the remaining three places. This means that there are always five provinces which have no representative on the Court. Nor does this distribution of justiceships coincide with the regional distribution of the Court's case load. The Western provinces, as a group, were the source of more Supreme Court appeals during the post-1949 period than either Ontario or Quebec,<sup>13</sup> and yet they had only two places on the Court compared to three each for Ontario and Quebec.

In Table III.2 we have tried to see if regional factors have had any effect on the Supreme Court's division of labour. The Supreme Court's case load for any given session is broken down into regional lists and for the most cases the Court sits in bancs of five. Table III.2 shows that during the post-1949 period the Maritime and Quebec

Table III.2

Regional participation in Supreme Court's reported decisions, 1950-64 (percentages)

Judges by region	Cases			
	Atlantic provinces	Quebec	Ontario	Western provinces
Atlantic provinces				
Rand	.94*	.57	.66	.66
Ritchie	1.00	.45	.64	.75
Quebec				
Rinfret	.50	.83	.44	.52
Taschereau	.40	.97	.44	.49
Fauteux	.48	.92	.42	.47
Abbott	.56	.92	.46	.47
Ontario				
Kerwin	.51	.33	.77	.62
Kellock	.66	.37	.51	.51
Cartwright	.84	.49	.88	.65
Judson	.72	.50	.88	.63
Spence	.00	.25	.47	.56
Western provinces				
Locke	.67	.30	.65	.85
Estey	.76	.49	.67	.87
Nolan	.00	.29	.23	.65
Martland	.72	.45	.66	.84
Hall	.00	.26	.41	.65

\*Each figure records percentage of cases on each of the Court's regional lists in which judge participated.

judges practised the highest degree of specialization in appeals from their own areas. The judges from the Western provinces have also shown a tendency to participate in cases from their own region relatively more often than in cases on the other regional lists. While

the degree of specialization is not so marked among the Ontario judges, still the three members of the Ontario quintet who were the most active members of the Court during the post-1949 period, Chief Justice Kerwin, and Justices Cartwright and Judson, all registered their highest frequency of participation in Ontario appeals.<sup>14</sup> Also with three Ontario judges on the Court, the individual Ontario judge, unlike his colleagues from the Western or Atlantic provinces, can often absent himself from an Ontario appeal with the knowledge that one or two of his provincial colleagues will be present for the appeal.

If we were to think of the regional pattern of representation on the Supreme Court as not merely resulting from political pressures on the appointing authority, we could conceive of it as designed to meet at least in part the federalist concern about Canada's judicial system. The slight tendency towards regional representation which characterizes the Supreme Court's division of labour will usually ensure that at least one of the justices hearing a provincial appeal case is from the province or region which is the source of the appeal. But this falls far short of arming the Court with the amount of local expertise which the advocates of a dual system of courts might demand. Only in Quebec appeal cases and in the occasional Ontario case will judges representing the province or region appealed from constitute a majority of the Court. The real question may be posed as follows: Is the very small measure of regionalization or federalization of the Supreme Court's organization which now exists at all worthwhile—given on the one hand, the extent to which it fails to meet the demands of the federalist critic and, on the other hand, the extent to which the non-federalist is apt to regard it as introducing irrelevant considerations into the selection of Supreme Court justices?

#### *4. Number of judges sitting for different types of cases*

Although the Court's total membership is now nine, it is unusual for all nine judges to sit for a case. Since the Court's beginning, five judges have constituted a quorum.<sup>15</sup> Throughout its existence the Court for most of its cases has sat as a five-judge court. Thus, even though the number of judges composing the Court has increased from six to nine, the number sitting for most cases has not increased from the required quorum of five. When the quorum is exceeded, the Court sits as a seven-judge or nine-judge court so that it can avoid an even split of its members. In the Court's earliest days, all of its six members often sat for a case and tie votes were not uncommon.

The establishment of a nine-judge court in 1949 was partially justified as a means of enabling the Court to sit in two panels, with the Chief Justice sitting with four judges at one time and four other judges at another time. This arrangement would "enable the whole nine judges to handle a much larger number of cases, if necessity should arise."<sup>16</sup> Apparently necessity did arise, for the Supreme Court sat in five-judge panels to handle the bulk of its business in the post-1949 period. These panels, however, did not follow the suggested pattern of combining the Chief Justice with alternative

quartets of puisne judges. All three Chief Justices who served during this period—Rinfret, Kerwin and Taschereau—were present in about the same proportion of cases as their colleagues.

It is one of the principal managerial functions of the Chief Justice to establish the panels or divisions of the Court which are to hear a particular case, or, more often, a particular series of cases. There are no fixed, published rules which the Chief Justice follows in making these assignments. An empirical study of the Supreme Court's divisions for its reported decisions from 1950 to 1964 does, however, reveal some general tendencies in the formation of these panels. We have already seen in Table III.2 that there is some degree of regional or provincial specialization in assigning judges to the provincial lists. Now we might also detect some general principle at work in deciding whether a case should be heard by a five-judge panel or a larger aggregation of judges.

In Table III.3 we can see that the number of judges sitting for a case has depended, to some extent, on the kind of issue before the Court. In the commonplace cases where there has been no question of great national import at stake the Court has usually just met the quorum requirement. Thus we find that in the bulk of cases involving disputes between private parties based either on the common law or Quebec's Civil Code only five judges have sat. The slightly higher percentage of common-law cases in which more than five judges have sat may simply be the result of there being relatively more common-law jurists available for cases raising difficult issues relating to

Table III.3

Different types of cases in which five, seven, and nine judges have sat (percentages)\*

Type of case	Five judges**	Seven judges***	Nine judges†
Civil Code	.94	.03	.03
Common law	.87	.10	.03
In which government is a party (non-criminal)	.74	.14	.12
Criminal	.59	.22	.19
Constitutional	.11	.43	.45

\* Based on Supreme Court's reported decisions, 1950-64.

\*\* Includes two cases with four judges.

\*\*\*Includes two cases with six judges.

† Includes two cases with eight judges.

the common law. On the other hand, when a question relating to the interpretation of the B.N.A. Act has been before the Court, it has usually been heard by a larger court. However, contrary to some expressed opinions on this matter, the full court has sat for less than half of the constitutional cases dealt with by the Court since 1949.

Also in criminal cases and in other cases involving a government as one of the parties (either as a litigant or intervenor) there has been a greater tendency for the larger court to adjudicate the issue.

When we put together the Court's practice of using a five-judge court for cases involving the Civil Code with the high level of participation displayed by the Quebec judges in Quebec cases, we can see how the 1949 addition of one Quebec judge has led to the civilian members of the bench enjoying good representation in most appeals involving Quebec's Civil Code. In the last section of Chapter IV we shall take a closer look at the effects this change has had on the Quebec judges' influence in Quebec appeal cases. Here we wish to focus attention on the growing orientation of the Supreme Court's method of organization towards specialized divisions. This is most marked and no doubt most appropriate in relation to Quebec's distinctive system of private law. It would not require a very drastic reform of the Court to ensure that in any case in which the interpretation of Quebec's Civil Code was the central issue civilian jurists would constitute a majority of the Court. The adoption of a statutory rule requiring the *ad hoc* appointment of a civilian jurist, whenever in a case dealing essentially with Quebec's Civil Code it was impossible to provide a civilian majority from the Court's own personnel, would only prevent the infrequent and accidental deviations from what has come to be the fairly well-established practice of the Court.<sup>17</sup>

We might note that there is already provision in the Supreme Court Act for the appointment of *ad hoc* judges.<sup>18</sup> Such appointments are made whenever there is not a quorum available for holding or continuing a session of the Court. *Ad hoc* judges must be appointed from the Exchequer Court or, if no Exchequer Court judge is available, from a provincial superior court. If the *ad hoc* judge is required for a case appealed from Quebec and less than two Quebec judges are available, the appointment must go to a member of the Quebec judiciary. These provisions, as they stand, were only meaningful when the Court's total membership was smaller and there was a real possibility that a quorum might be lacking during a session. With nine judges now belonging to the Court it is highly unlikely that there would ever be cause to appoint an *ad hoc* judge. However, the *ad hoc* mechanism could be used to guarantee a majority of civilian jurists for certain categories of Quebec appeals by means of the amendment outlined above. This approach to overcoming what many Quebec critics regard as the under-representation of civilian jurisprudence on the Supreme Court might be preferable to simply adding Quebec jurists to the permanent membership of the Court. The latter approach is likely to entail the appointment of additional Ontario judges as required by the political principle of Ontario-Quebec parity.

One might react to these statistics regarding the number of judges present for different types of cases in quite a different way and argue that far from increasing its tendency to sit in divisions the Supreme Court should sit as a *plenum* with all nine members bringing their wisdom and experience to bear upon each case which comes before



the Court. This policy would be possible and appropriate only if the Supreme Court's jurisdiction were drastically changed so that only cases involving issues of major importance to the legal fabric of the nation were admitted to the Court's docket. Under existing legislation and practice the bulk of the cases which come before the court concern rather mundane questions of "lawyer's law" relating to controversies between private groups or individuals.<sup>19</sup> It would be difficult to contend that the final resolution of these issues requires the attention of more than five judges. Also, given the lack of clerical and research assistance available to the Court's members and the length of time the Court permits for oral argument, sheer pressure of time makes some division of the work load among the judges a necessity. Even if this situation is not basically altered and the Supreme Court does not follow the direction of the United States Supreme Court and become an essentially public law tribunal confining its energies to questions of national importance, it might at least be possible for the full court to sit for cases involving the interpretation of the Constitution. It would seem fitting that the Court's full membership, representing the country's main regional divisions and, hopefully, the highest level of its juristic talent, should be engaged in the exercise of what is undoubtedly the Court's most significant function—the arbitration of the federal division of powers.<sup>20</sup>

##### *5. The Chief Justiceship*

In recent years there has been some suggestion that the Chief Justiceship of the Supreme Court is one of those positions in the Canadian system of government which should be rotated among French- and English-speaking incumbents. The last few appointments are consistent with this theory. Chief Justice Duff of British Columbia was succeeded by Chief Justice Rinfret of Quebec in 1944. Chief Justice Kerwin of Ontario took Rinfret's place in 1954 and was in turn succeeded by the present Chief Justice, Robert Taschereau a Quebec jurist, in 1963. While these four appointments are consistent with a theory of French-English rotation, we should also note that in each case the Chief Justice at the time of his appointment was the senior (in terms of years of service) *puisne* judge on the Court's bench.

When we go back beyond the four most recent appointments, we discover that there is no trace of a French-English rotation in the Chief Justiceship of the Court. Of the seven Chief Justices who preceded Sir Lyman Duff only two, Henri E. Taschereau and Sir Charles Fitzpatrick, were from Quebec. Seniority again appears to have been a more important qualification for the office of Chief Justice than ethnic or provincial origin, although even seniority does not provide a consistent thread to the series of appointments. The first three Chief Justices, Richards (1875), Ritchie (1879) and Strong (1892), were all members of the first Supreme Court in 1875. Along with Justice Jean Thomas Taschereau who retired very shortly after his appointment, they were the members of the original Court with previous judicial experience. Following the retirement of Chief Justice

Strong in 1902, Henri Elzéar Taschereau became the first French Canadian to hold the position of Chief Justice. It should be noted that at the time of his appointment, Taschereau was the Court's senior member. Chief Justice Taschereau was succeeded in 1906 by another Quebecker, Sir Charles Fitzpatrick, who came to the Court directly from the federal cabinet where he had held the post of Minister of Justice. This was the first and last time in the Supreme Court's history that a Chief Justice was not promoted from within the Court.<sup>21</sup> The seniority principle was, however, reasserted when Sir Louis Davies of Prince Edward Island succeeded Sir Charles Fitzpatrick in 1918. The appointment of the last Chief Justice to serve before Sir Lyman Duff represents the one other deviation from the seniority rule. When Justice Francis Anglin was appointed to succeed Sir Louis Davies in 1924, both Justice Idington and Justice Duff were senior to Anglin in terms of years of service on the Supreme Court.

The frequency with which the seniority principle has been followed in the selection of Chief Justices as compared with the relatively infrequent observance of the principle of French-English rotation is perhaps a reflection of the general lack of importance associated with the position of Chief Justice on the Canadian Supreme Court. If the Chief Justice of Canada were as important a figure in the nation's governmental system as is either the Lord Chancellor in Great Britain or the Chief Justice of the United States, more attention might have been given to the personal qualifications of the men selected for the position. That is not to say that the position is of no consequence at all. The Supreme Court Act does assign some special responsibilities and powers to the Chief Justice. He possesses the power to convene the Court at any time,<sup>22</sup> he has the right to appoint *ad hoc* judges<sup>23</sup> and he is responsible for arranging the Court's work load for a given session.<sup>24</sup> He is also *ex officio* the deputy Governor General of Canada. But none of these attributes of the office reaches nearly as far as those associated with the Chief Justiceship of the United States or the Lord Chancellorship in Great Britain.

The latter position is hardly comparable to the position of Chief Justice in Canada, for the Lord Chancellor, while he is the ranking member of the country's final court of appeal, the House of Lords and the Judicial Committee of the Privy Council, at the same time is a member of the cabinet and the head of a large department of state. The closer comparison is with the Chief Justice of the United States Supreme Court.

In part, the greater prestige and influence attached to the office of Chief Justice in the United States result from the greater prominence the United States Supreme Court has achieved in the American governmental system. But in addition to this, there is a very real contrast between the roles played by the American and Canadian Chief Justices in their respective court's decision-making processes. A former clerk to Justice Black of the United States Supreme Court, summarizing the source of the power wielded by that Court's Chief Justice, has written that "The two really meaningful functions of

the Chief in relation to his brethren are his chairmanship of the Court's own conference . . . and his assignment of the writing of opinions."<sup>25</sup>

This same statement could certainly not be made about the role of the Canadian Chief Justice. The Canadian Supreme Court has never followed the American practice of holding regular conferences of the full court in order to identify the main issues at stake in the decisions before the Court and to assign opinion-writing responsibilities.<sup>26</sup> As we have seen more often than not the Canadian Court functions in divisions of five. And when the full Court does address its collective energies to a case of major importance, for instance a case concerning the interpretation of the Constitution, there is no evidence to suggest that the Chief Justice, even on these occasions, tries in conference to lead the Court towards clarifying the issues at stake or identifying the Court's main divisions. Some of the Court's most important constitutional decisions have produced nine separate opinions with several on the majority side, none of which was designated as *the* opinion of the Court.

In a word, the Canadian Chief Justice has not been in any meaningful sense a leader of the Court. Some, like Chief Justice Duff, by virtue of their superior ability and energy, have at certain times been able to command the respect and allegiance of their colleagues, but none has developed the institutional or procedural devices whereby in a deliberate and consistent way they might exercise leadership in the Court's adjudicative process.

In concluding this discussion of the Chief Justiceship we should note that the real difference in the power exercised by the United States Chief Justice as compared with his Canadian counterpart does not depend on any great difference in their legal capacities. It is certainly legally possible for a Canadian Chief Justice to develop conference and opinion-writing practices which would make his position more analogous with that of the American Chief Justice. If this were to occur and were accompanied by a general increase in the prominence of the Supreme Court in the Canadian system of government, then the demand for a bicultural rotation of the position of Chief Justice might acquire much greater support.

#### *6. Other factors affecting appointments to the Supreme Court*

Thus far we have examined only the very overt legal and conventional factors affecting the composition of the Supreme Court. Behind these factors a network of more covert and possibly more decisive influences are at work in the process of selecting Supreme Court judges. We are forced of course to acknowledge the possibility that such influences might exist once we recognize the political character of the appointing authority—the federal government.<sup>27</sup> It would go beyond the scope of this study to attempt a comprehensive analysis of the considerations and pressures which have been operative in shaping the choices made by federal politicians in filling Supreme Court vacancies. Still, to ignore even some general reference to these factors would be to overlook some of the most distinguishing character-



istics of the Supreme Court's membership. At least we must glimpse the way in which the existing system of selection has tended to increase the likelihood that certain kinds of lawyers from both French- and English-speaking Canada will occupy positions on the Supreme Court bench.

Generalizations in this area are difficult to make. In a sense each appointment to the Court is the result of a unique set of transactions.<sup>28</sup> Yet there are some general factors influencing the selection of Supreme Court judges which can be gleaned from surveying the barest biographical data on the 49 men who have been appointed to the Court since its establishment in 1875.<sup>29</sup>

The most obvious point which these biographical data reveal is that there are two career patterns which are most apt to lead to the Supreme Court—politics and the federally-appointed judiciary. Of the 49 lawyers who have served on the Court only 10 had not previously been either members of a federal or provincial legislature or members of the bench of a provincial superior court.<sup>30</sup> And even among the 10 exceptions, two, Sedgwick and Newcombe, served as Deputy Ministers of Justice in Ottawa, which would bring them well within the inner circle of legal men of influence in the federal government. We should further note a considerable amount of overlap between those who were promoted from the provincial courts and those who had been actively engaged in party politics: 11 of the 27 Supreme Court judges who rose from provincial courts had been either federal members of Parliament or members of a provincial legislature before being appointed to the provincial courts.

More than half the 23 judges who had at one time or another been elected politicians, had held very prominent governmental positions. Most frequently their positions were closely associated with the administration of justice at either the provincial or federal level—six of the judges had held the post of Attorney General in a province;<sup>31</sup> three others had been federal Minister of Justice.<sup>32</sup> The latter trio are particularly interesting inasmuch as the federal Minister of Justice is normally the cabinet minister directly responsible for advising the Prime Minister and cabinet on the selection of federal judges. Two of these ex-Ministers of Justice, Mills and Fitzpatrick, went directly from the Department of Justice to the Supreme Court.<sup>33</sup> In addition to these three Ministers of Justice, three other appointments went to senior federal cabinet ministers.<sup>34</sup> Finally, two appointees had been provincial premiers.<sup>35</sup>

There has been a tendency for the pattern of "political" appointments to vary regionally, among the parties and over time. Most of the judges who had previously been prominent in politics have come from the Atlantic provinces and Quebec—six of the eight judges from the Maritimes and nine of Quebec's 13 appointees had been elected to provincial or federal legislatures, whereas only four of the Western provinces' nine judges and four of Ontario's 19 had earlier political careers. Also, of this group of judges with a prominent political background, far more were appointed by Liberal than by Conservative administrations. All but one of the dozen



political notables referred to in the preceding paragraph were Liberal appointments.<sup>36</sup> In some respects this situation is analogous to that which exists in the Canadian Senate, where the greater number of years during which the Liberal party has held power nationally has meant a long-run Liberal preponderance in the Senate's political composition. However, in the case of Supreme Court appointments the Liberals enjoyed the extra advantage of having been in power at the time of the Court's establishment.<sup>37</sup> But it should be noted that in contrast to Senatorial appointments, Supreme Court appointments have often gone to jurists who have had no strong political affiliations at all and even on occasion to persons active in the party opposite to that of the appointing government.<sup>38</sup> (As is the tendency with appointments to the Senate, however, no lawyer who has been an active member of one of the minor or "third" parties has ever been appointed to the Supreme Court.)

Finally we must draw attention to what might now be regarded as the most significant development in the appointment of political notables—that is, the marked decline of such appointments in recent years. Of the nine appointments made since the end of World War II, only one (the appointment in 1954 of Douglas Abbott, the Liberal Minister of Finance) went to a person who had been prominent in politics.<sup>39</sup> Indeed, prior to Abbott's appointment the most recent example of a federal government elevating one of its own members to the Supreme Court bench was the appointment of Louis Brodeur, Minister of Fisheries, in 1911. One of the positive aspects of this trend has been the selection of persons whose background is distinguished more by academic than by political activity. Five of the 14 judges appointed since 1940 had been active in teaching at Canadian law schools;<sup>40</sup> whereas before this time only two judges are listed as having held academic appointments.<sup>41</sup> To some extent this change reflects the greatly expanded role of university law schools in the Canadian legal community. It is also likely that this recent trend towards a greater recognition of academic talent, as well as the apparent downgrading of political prominence in favour of a greater emphasis on professional accomplishments, represents a reaction to the growing stream of criticism directed against the political nature of judicial appointments in Canada.<sup>42</sup>

In describing the principal parameters of Supreme Court appointments our purpose has been to reveal the rather narrow range of legal talents and interests which federal governments have drawn upon in staffing the Supreme Court. Even when we allow for the broader criteria of selection which appear to have been operative in recent appointments we must conclude that over the years the bulk of appointments have gone to a rather small circle of lawyers and judges who by virtue of their formal political activity or service to the administration of justice, or both, were well known to the federal politicians who ultimately made the selections. It is unrealistic to expect this tendency to be abandoned so long as the power of appointment rests exclusively in the hands of the federal government. A 1940 entry in the diary of Prime Minister King reveals how natural it

may become for a Prime Minister to look upon his political lieutenants as the most logical candidates for the Supreme Court bench. King records that "Lapointe mentioned . . . that Ralston had his heart set on the Supreme Court, and I agreed we should make him Chief Justice when Duff's time to retire comes. Lapointe himself might have pressed for that post had he been other than the unselfish man that he is."<sup>43</sup> The worrisome point about this disclosure is not that either Justice Minister Lapointe or Finance Minister Ralston was undeserving of consideration for the Supreme Court. What is disturbing is the easy monopoly of power in determining high judicial appointments which the quotation indicates may be exercised at the apex of the federal political establishment.

This situation may have several adverse effects on the Supreme Court. In the first place the political basis of Supreme Court appointments may weaken the Court's capacity for acting as an effective arbiter of Canada's federal system. Besides the general loss of prestige and respect which a court incurs as a consequence of partisan appointments to its bench, there is the particular danger in the case of the Supreme Court that the federal source of the patronage involved in selecting its judges might undermine the confidence of provincial interests in the Supreme Court's impartiality in adjudicating Dominion-provincial disputes. There may be, as we suggested in Chapter II, little if any real evidence of a centralist bias in the Supreme Court's constitutional decisions.<sup>44</sup> Nevertheless, the complete dependence of the Court on the federal level of government remains a source of provincial suspicion. This suspicion is hardly alleviated by a series of appointments which suggest that the federal government has frequently favoured its political supporters in filling vacancies on the Court. On this point it is relevant to observe that while a number of prominent federal politicians have been transferred directly to the Supreme Court bench, all but one of those members of the Court who were once active in provincial politics<sup>45</sup> had left their provincial posts some years—in most cases a decade—before their appointment to the Supreme Court. Clearly the provincial political interests which might be consulted in selecting a judge from a particular province or region will most likely be those within the provincial wing of the federal party which holds national power.

It is a further source of concern that political considerations may have greatly limited the search for the most promising judicial talent in staffing the Supreme Court. Without any narrow partisanship on the part of the appointing authority the field of distinguished lawyers who are likely to accept judicial appointments is already severely limited in Canada. As O. M. Biggar pointed out some years ago, "the problem of recruiting the Bench is a very much more serious one in Canada than in England, by reason both of the greater hesitation possible appointees in Canada have in accepting offers of appointment and of the greater difficulties the appointing authority has to meet in making selections."<sup>46</sup> This point has serious implications for the Supreme Court, for in addition to the general

reluctance of outstanding Canadian lawyers to take judicial appointments, it seems clear that the Supreme Court, unlike the highest courts of both the United Kingdom and the United States, has not acquired the pre-eminence which might make a place on its bench a logical goal for the most talented members of the country's legal profession. Whatever the reasons for the relative unattractiveness of the bench in Canada,<sup>47</sup> it is surely clear that the country can ill afford to restrict further the jurists available for manning its highest tribunal by limiting the selection to those who have political connections with the party in power.

To understand fully the possible shortcomings of the existing appointment system we must remember that in Canada the federal government is responsible for appointments to virtually all the senior positions in the Canadian judiciary. In addition to its power of appointing the members of "federal" courts such as the Supreme and Exchequer Courts it also possesses under section 96 of the B.N.A. Act the power of appointing the judges of the Superior, District and County Courts in each province. This means that candidates for all of the principal positions in the provincial judiciaries must pass through the same political screen as those considered for Supreme Court appointments. Granted that in selecting provincial judges there may be more opportunity for consultation with local professional and political groups, nevertheless the web of political interests imposed upon this selection process will primarily emanate from the federal political party in power. This point should be borne in mind in assessing the significance of the fact that 27 of the 49 Supreme Court appointments went to provincial judges; all of these judges had previously been selected by the federal government for the provincial bench, and indeed, as we have noted above, 11 of these persons had been active participants in the political arena.

In Chapter II we examined the federalist concern over the central government's monopoly in the field of judicial appointments. We can now see that the extent to which federal political patronage has entered into the federal government's exercise of its power provides further substance for that concern. It may be that the federalist concern can now indicate one of the most promising avenues of reform—the participation of provincial governments in judicial appointments.

The usual approach to reform in this area is to call for some arrangement which would enable representatives of the professional bar associations to nominate the lawyers from which the federal cabinet would select judges. Already there has been considerable progress in this direction. Representatives of the local bar have been consulted on many judicial appointments (although their advice certainly has not always been followed). Recently there has been some indication that the government is prepared to formalize this process of professional consultations—the Minister of Justice is reported as saying "it would be a valuable step if various provincial bar associations would voluntarily send in regular panels of names of lawyers who would make good judges, regardless of political application."<sup>48</sup> But even the broadening and institutionalization of this system of



professional nominations will still leave the federal cabinet with a monopoly power of final selection.

Thus it may be that in addition to establishing a more formalized procedure of professional nominations what is required for providing some real improvement in the quality of judicial appointments is a bifurcation of the appointing power. It might at least become less possible for uninspired or partisan judicial appointments by the federal government to pass relatively unnoticed if they could be compared unfavourably with judicial appointments made by provincial administrations. As it is now, with only one stream of appointments issuing from one appointing agency, no such comparisons are possible. No doubt, if the provinces took over responsibility for appointing Section 96 judges or, on a rotational basis, shared in the selection of Supreme Court judges, they too might be subject to partisan political considerations in making their selections. But this would still represent a broadening of the political and social interests which are now influential in selecting Canadian judges. Also, the partisanship exercised by a provincial government in appointing provincial judges is likely to be far more vulnerable to public scrutiny than is the existing federal partisanship in judicial appointments.

We have not examined here other non-legal factors which may affect the selection of Supreme Court justices. It is often suggested, for example, that the federal government tries to maintain some religious balance between Protestants and Roman Catholics on the Court or a balance between the Quebec City and Montreal divisions of the Quebec bar. But there is no evidence of any consistent representational patterns in these and other areas. Even with regard to religious considerations, about all the record of past appointments entitles us to say is that there has usually been a Catholic judge from outside Quebec on the Court.<sup>49</sup> Given the political considerations which impinge on the appointing process, it is likely that in filling any given vacancy on the Court, the government might use the opportunity to patronize some regional, religious or ethnic<sup>50</sup> component of its political base.

It may seem that we have wandered far from our main concern with the bicultural and bilingual capacities of the Court in this examination of the non-legal factors affecting the Court's composition. But these factors have an immediate bearing on the quality of the Court and the respect which it inspires in the Canadian people. Whatever else the Court must have, if it is to act creatively and effectively as the highest tribunal for a bilingual and bicultural society, it must be staffed by jurists of the highest calibre. There will always be some room for disagreement as to the requisite qualities of a Supreme Court justice. Certainly there is a case for having both former politicians and former lower court judges on the Supreme Court bench. The former can enrich the Court's outlook with a broad awareness of the social context to which the law must be adapted and a sensitivity to the policy interests of different levels of government; the latter can bring to the Court a mature approach to adjudicative problems ripened by years of experience on the bench.



But the strength and merit of the Court's bench are threatened when the choice of politician or lower court judge is influenced by the partisan considerations of the dominant federal political party. Surely any program which aims at increasing the Court's capacity for acting bilingually or for imaginatively directing the mutual development and interaction of the common-law and civil-law systems is likely to be abortive unless it comes to grips with the problem of designing a method of selection which is more likely to bring the appropriate talents to the Supreme Court's bench.

### *7. The Supreme Court's non-judicial staff*

In our examination of the bilingual and bicultural capacities of the Supreme Court's administrative staff we did not find any serious shortcomings. The two most important posts on the administrative side of the Court are those of the Registrar and Deputy Registrar. The Registrar, assisted by the Deputy Registrar, is responsible for supervising the work of all the officers, clerks and employees appointed to the Court, the Court's library, as well as the reporting and publication of the Court's judgments.<sup>51</sup> While there is no statutory rule that these two senior officials must come from Canada's two major ethnic divisions, this is presently the case—the Registrar is an English-speaking and the Deputy Registrar is a French-speaking lawyer. François des Rivières, the Deputy Registrar who also acts as one of the editors of the official reports of the Court,<sup>52</sup> is completely bilingual. The Registrar, K. J. Matheson, while not fluent in French is certainly able to correspond and converse in French when conducting Court business.

The clerks who work in the Registrar's office are the employees with whom lawyers most frequently have contact when bringing a case before the Court. At the present time these clerks are all persons whose first language is French but who are completely bilingual. Also the Court is served by four bilingual messengers. The Supreme Court Library, which incidentally now has a very impressive collection of French legal materials, has a common-law, English-speaking librarian, W. J. B. Grierson and a civil-law, French-speaking librarian, Reynald Boulton. A number of library clerks, some of whom are bilingual, work under the direction of these two librarians.

Each judge has a private secretary who usually speaks the same language as the judge she serves. These secretaries carry out stenographic responsibilities; their work in no way resembles that of the law clerks attached to justices in the senior American courts. Only the Chief Justice has, in the person of W. K. Campbell, Administrative Secretary to the Court, an assistant who comes even close to performing some of the duties carried out by law clerks<sup>53</sup> in the United States. A number of justices now serving on the Court have expressed the view that the Court might be much more capable of devoting more individual reflection and collective deliberation to each case if its members were assisted by competent law clerks in carrying out research and preparing preliminary analyses of cases.<sup>54</sup> Further,

a French-speaking civilian law clerk might be of great assistance in helping an English-speaking common-law judge prepare himself for adjudicating a Civil Code case presented in French. The appointment of law clerks, by reducing the burden of research and preparation of opinions now imposed on each judge, would have the further advantage of enabling the full court to sit for a large number, if not all, of the important cases which come before it.

### *B. Bilingualism in the Court's Procedures*

Section 133 of the B.N.A. Act states that either the English or the French language "may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, . . ." This Section clearly establishes the right of any litigant to use either French or English in pleading his case before the Supreme Court of Canada. But it is one thing to grant individuals a right, and quite a different thing for the public authorities who are legally bound to recognize such rights to create the positive environment in which these rights can be most effectively exercised. While there has never been any suggestion that English-speaking persons have had difficulty in exercising their linguistic rights in the Supreme Court, French-speaking Canadians have complained that the situation in the Court is such that a French-speaking counsel is often seriously handicapped if he decides to exercise the right to use his first language when pleading cases before the Court.<sup>55</sup>

We have already seen the chief grounds of this complaint in our examination of the linguistic capabilities of the Court's personnel: some (on some courts, all) of the English-speaking judges on the Court are not thoroughly bilingual and these judges are often present when French-speaking counsel appear before the Court. In this section we wish to push our analysis a stage further and try to ascertain in which parts of the Court's proceedings the failure of judges to be bilingual might be most significant. This should provide a better basis on which to assess the seriousness of the linguistic shortcomings of the Court's personnel. We might also be able to point out possible means of compensating for any linguistic deficiencies by some adjustment in the Court's method of conducting its business. These suggestions, for the most part, will be alternatives to the more direct approach to the bilingual problem which would be to ensure that only judges thoroughly proficient in French deal with cases in which lawyers choose to conduct their case in French.

Besides exploring the bilingual implications of the Court's proceedings we are also interested in describing the general style of the Court's adjudicative method. Although this part of our inquiry is not uniquely relevant to the Court's bilingual and bicultural dimensions, it should throw light on the Court's general ability to perform any of its major functions, including those which might be considered relevant to the Court's impact on bicultural or bilingual values.

### 1. *Principal stages in the Supreme Court's proceedings*

It is not an easy task to set out with any degree of precision the most significant aspects of the Supreme Court's adjudicative method. A leading student of the Court has said that, "Its system is characterized by freedom from system."<sup>56</sup> The Supreme Court Act and the Rules of the Supreme Court<sup>57</sup> establish some of the organizational and procedural principles which Court practice must follow but they do not provide a very complete picture of the Court's administrative system. There are several scholars who on the basis of observation and conjecture have tried to give a more adequate description of the Court's methods.<sup>58</sup> We have augmented these sources of information by interviewing those judges who are currently serving on the Court, as well as the Court's principal administrative officers, the Registrar and Deputy Registrar.<sup>59</sup>

#### *a) Written presentations*

In each appeal case which comes before the Court two written documents must be filed with the Court. First, the appellant is required by the Supreme Court Act<sup>60</sup> and rules<sup>61</sup> to provide a record of the proceedings and reasons for judgment in the courts below. This document is known as the "case." Twenty copies of the case must be deposited with the Registrar<sup>62</sup> for use of the Court and three copies must be sent to the solicitors for the other parties in the case. Secondly, both the appellant and respondent must present a "factum" in which they set out the main points in their respective arguments.<sup>63</sup> Each side must deposit twenty copies of its factum with the Court.<sup>64</sup> It is only after each side has deposited its factum with the Court that the parties exchange factums, thus preventing any opportunity for the respondent to reply in his factum to new points raised by the appellant on appeal.<sup>65</sup>

The language in which the "case" is presented will depend entirely on the language or languages used in the proceedings below. If the appeal is from Quebec it is likely that most of the proceedings, evidence, exhibits and lower court judgments will have been in French. However, where a litigant or judge below was English, there will be a certain amount of English-language material in the case. The language of the factums is chosen by the lawyers representing the parties in the case. We shall examine below the factors which appear to have influenced French-speaking counsel in deciding whether to write their arguments in French or English. What we should note here is that in Quebec appeals factums are now written about as often in English as they are in French. If we take all the Quebec appeals which the Court heard from the beginning of the January term, 1963 until we completed our research in 1965 we find almost an equal division of French and English factums.<sup>66</sup> In 25 of the 73 cases both sides presented factums in English, in 24 cases both factums were in French and in the remaining 24 one side wrote its factum in English, the other in French. This even balance in the use of the two languages in writing factums clearly does not coincide with the high



percentage of persons among the Quebec population whose first language is French as well as the percentage of French-speaking persons among the Quebec lawyers and litigants coming before the Supreme Court. Certainly there are numerous examples of lawyers whose first language is French choosing to present their factums in English.

Under the present system no translations of either the cases or the factums are made for the Supreme Court judges. This is a change from at least the Rules in force earlier in the Court's history. According to the Court's original Rules, any judge could have a factum or judgment below "translated into the language with which such judge is most familiar."<sup>67</sup> These translations were to be carried out under the supervision of the Registrar, at the expense of the litigant whose factum was to be translated or, in the case of the judgment below, at the expense of the appellant. This provision for a translation when requested by a judge was omitted when the Rules were last revised in 1945. The principal explanation for this change offered by the Court's officials is that with the great improvement in the facility of the English-speaking justices in French, the Rule had fallen into disuse. Moreover it might also have been thought that a translation service tends to inhibit the development of true bilingualism on the part of those who avail themselves of it. Added to this is the great difficulty translators encounter in trying to find accurate English equivalents for French legal terms and vice versa. Finally, a system in which English-speaking judges would be responsible for imposing on French-speaking litigants the considerable expense of providing translations might have been embarrassing to the judges if not galling to the litigants.<sup>68</sup>

The quality and length of the factum as well as the use made of it by the Court will, to some extent, depend on the lawyer who prepares it and the complexity of the case. But still, as a general rule, it is true to say that the factum plays a far less significant role in the Supreme Court's decision-making system than does the "brief" in the United States Supreme Court system. While briefs in the American system serve the same general purpose as the Canadian factums (marshalling the main points of argument for each side), not only are they more extensive and usually more carefully prepared but also they are taken more seriously by both judges and lawyers. The appellant's brief is served on the respondent well before oral argument, and the respondent's answering brief is served on the appellant again well before oral argument. In some cases the appellant may serve a reply brief. In the Court the briefs are used by the judges to analyze the central issues in the cases and prepare themselves for oral argument. Indeed in some instances the Court has dispensed with oral argument completely, deciding the case entirely on the basis of the brief. But in contrast to this, oral argument is by far the most important stage in the Supreme Court of Canada's decision-making process. Often (one might even say usually) the factums are not thoroughly read or researched by the judges before hearing an oral argument. They may be used by the judges in following counsel's oral argument, but the main documents consulted by the judges before the oral



argument are the judgments in the Court below and a summary of these will often be prepared for the bench before hearing a case. In this respect the adjudicative style of the Supreme Court of Canada comes much closer to that which characterizes the highest appellate courts in England, where no briefs or factums are filed at all,<sup>69</sup> and aside from a short six- or seven-page written summary of the main issues in the case, the court relies entirely on oral argument in deciding a case.<sup>70</sup>

The Supreme Court has gone further than the Privy Council in requesting counsel in *every* case *systematically* to set out in writing their main points of argument but it has not yet adjusted its mode of operation to make full use of the material presented in the factums. In the United States justices are assisted by law clerks in studying and organizing the material presented in briefs. Without any such assistance Canadian Supreme Court judges are usually not in a position to carry out an extensive examination of the written documents submitted for a case prior to oral argument. In a given two-month session a judge may be called on to sit for 25 to 30 cases in each of which there will be a copy of the proceedings below (the "case") running usually to well over 100 pages and two factums that might be anywhere from 25 to several 100 pages each in length.<sup>71</sup> When we bear in mind that the Court's generosity in the length of time it permits for oral argument means that the judges will spend a large part of their time during a session on the bench, it is clear that they will have relatively little time in their chambers to explore adequately the authorities and analyze the factual contentions presented in factums. Without belittling the knowledgeable and conscientious assistance of the Court's librarians, which is now the only "research" assistance available to the judges, it is fair to say that the Court will not be able to make satisfactory use of the written materials submitted to it unless its members are assisted by professional law clerks. Where common-law judges who are less than thoroughly bilingual or expert in Quebec's civil-law system are called upon to hear Quebec appeals, presented in French, there may be a particularly strong need for a thorough preliminary study of the case before hearing oral arguments. Here, as we suggested above, a very strong case could be made for attaching bilingual civilian lawyers, as law clerks, to common-law, English-speaking judges. There might also be some merit in providing Quebec judges with the assistance of common-law law clerks. This might be far more effective than formal translations as a means of ensuring that judges understand the written materials regardless of the language in which they are written. It has the further advantage of imposing the cost of compensating for the linguistic inadequacies of the Court's personnel on the Court rather than on the litigant.

One further point should be stressed in relation to the role of factums. If the preparation of factums by counsel and their study by judges became a far more central part of the Supreme Court's decision-making system, this would undoubtedly shift the general character of the Court's adjudicative style further away from that of

a normal court room trial to something much closer to that of a legal policy-making seminar. A team of English and American judges, lawyers and law professors recently concluded their comparative analysis of their two countries' systems of appellate courts by emphasizing this basic contrast in the conception of their role held by English and American judges.<sup>72</sup> Whereas in England, "Appellate judges tend to regard their job as complete when they reach a correct conclusion on the case presented to them," the work of the highest American judges

sometimes seems more akin to that of research scholars than that of trial judges. Insofar as they deal with constitutional problems, they are dealing with matters beyond even the reach of ordinary legislative processes. Insofar as they deal with statutory or common-law problems, many judges conceive it to be their duty to reform rules that they consider unjust or obsolete. They place greater stress on their lawmaking functions than do their English cousins, being at least as interested in laying down guidelines for the future as in deciding correctly the cases before them.<sup>73</sup>

While their tradition and education may naturally incline the Canadian Supreme Court's bar and bench more towards the English than the American model, the responsibilities imposed on them by the country's constitutional and legal system may make it appropriate for them to move more in the direction of American practice. Charged with the task of being the final arbiters of the written Constitution, the Court's members, unlike their English colleagues, are whether they like it or not involved in an area of adjudication where their decisions have large policy implications for the whole nation and are not easily reversible by elected legislatures. Moreover, the Reference case procedure which is frequently resorted to by both levels of government in Canada brings major constitutional questions before the Court more in the form of general problems or questions for scholarly inquiry than in the form of carefully defined points in argument for a particular cause.<sup>74</sup> Finally, the responsibility of mastering the basic tenets of Canada's two legal traditions—the English common law and the French civil law—challenges the Court's resources for scholarship and reflection. In this context it may well be incumbent on the Court to adopt practices which enable its judges to devote more of their time and energies to their own investigation of the legal and factual materials bearing upon a case even if this is at the expense of time spent following counsel's oral pleadings in the court room.<sup>75</sup>

#### *b) Oral argument*

As with so many dimensions of the Canadian Supreme Court, the role of oral argument is best understood by keeping in mind the middle ground which Supreme Court practice occupies between that of American and British appellate courts. If anything the Canadian Court leans a little more towards the practice of the highest English courts than that of the American appellate courts in the emphasis which it places

on oral argument. In contrast to the United States Supreme Court, where normally each side is permitted only one hour in which to present its case, the Supreme Court of Canada like the British appellate courts places no strict time limit on oral argument. However, neither the Supreme Court's bench nor its bar has been willing to spend as much time on oral argument as have their counterparts in England. In the House of Lords, for example, as many as 20 days might be consumed by the hearing for a single case and the average is about three days.<sup>76</sup> In Canada's Supreme Court, while no precise record has been kept, the average, or better, the median, would appear to be closer to half that time.<sup>77</sup>

Although oral argument in the Supreme Court might not be quite as extensive as it tends to be in the senior British courts, it remains the most decisive stage in the Court's decision-making process. This means that the judges rely mainly on counsel in their oral arguments to pinpoint the main issues and develop the central considerations for each side of the case. The Court, then, tends to see its role as essentially that of deciding the relative merit of the points raised in debate by counsel rather than that of independently studying the issues with a view to working out what from a technically legal or policy-oriented point of view appears to be the most appropriate solutions.

The hearing in most cases is conducted in a fairly informal atmosphere with a considerable amount of interchange between lawyers and judges. Counsel for the appellant leads off the hearing, presenting his reasons for upsetting the decision of the court below. Members of the bench might intervene to ask him further questions on a particular point or to indicate to him the points upon which they remain unconvinced. The judges in some cases will converse with each other while the argument is in progress in order to agree on the aspects of the case which they feel merit further exploration. In some instances, after hearing some or all of the appellant's argument, the bench may feel that no strong reasons have been advanced for reconsidering the opinion of the courts below, in which case they will dismiss the appeal and terminate the hearing without argument for the respondent. Our study of the Court's minute-book for the 1964-5 sessions of the Court indicated that about one out of every eight appeals coming before the Court was treated in this way. This, of course, reflects the fact that a large proportion of the Supreme Court's cases are not screened by the Court but are appeals as of right.<sup>78</sup> But normally the respondent's argument is heard and then each side has an opportunity to reply; again there will be a considerable amount of cross-examination of counsel by the bench. Two counsel may be heard for each side in the first stage of argument but only one counsel will be heard for each side in reply.<sup>79</sup> After the oral argument is heard the Court usually reserves judgment.

In this kind of appellate procedure oral communication is mainly concerned, not with the examination of witnesses, but with the debate between the opposing counsel and the direction of that debate by the bench. In this context the question of the language—French or



English—which counsel and judges use can have a very significant impact on the facility of communication and the degree of comprehension enjoyed by all those participating in the hearing. The most obvious situation in which a difference of language may adversely affect communication is when English-speaking judges who have a very limited understanding of French sit for cases in which counsel through choice or necessity argue in French. Our examination of the Court's composition in Quebec's appeals, which we reported above, indicated that these situations frequently occur. In these circumstances the English-speaking judge will gain some assistance from the *factum* and the "case." Even if he has not studied these documents thoroughly beforehand, he will at least have them before him during the hearing. He might be further assisted by his French-speaking colleagues on the bench and could direct questions through them to the French-speaking counsel. Also, if counsel is fairly bilingual, he might switch from French into English in order to communicate more effectively with the English-speaking judge. Still it is likely that in many of these situations one or two of the English-speaking judges will be less than perfectly informed of the progress of the argument as it evolves.

Language difficulties may also make it difficult for litigants to follow the hearing. This is apt to occur when each side pleads in a different language and counsel or the parties on one or both sides are not bilingual. In this situation, even if the case were being conducted before a completely bilingual bench, one or both sides might experience difficulty in adequately comprehending the proceedings. Counsel for each side will have had an opportunity to examine the other side's *factum* some time before the hearing,<sup>80</sup> but it should be borne in mind that in contrast to the American practice, counsel can reply directly to his adversaries' points only during the oral argument.<sup>81</sup> The permission granted in the Rules to have two counsel represent each party means that theoretically a litigant's lawyer could compensate for his linguistic inadequacies by bringing another lawyer into the case. However, when we asked French-speaking members of the Supreme Court bar whether they ever resorted to this device we received only one positive reply.<sup>82</sup> On the other hand there are known instances of English-speaking lawyers or firms associating a French-speaking counsel with a case when it goes before the Supreme Court and the other side is expected to plead in French.

We have touched here only on the ways in which the lack of complete bilingualism on the part of either the Supreme Court's bar or bench might impair communications during the oral argument stage of proceedings. But over and beyond this there is a problem which some might view as more serious: that is the extent to which anticipation of these language problems might either inhibit lawyers from taking cases to the Supreme Court or cause them to plead these in the language which is not their native tongue. These possibilities are most likely to arise among French-speaking lawyers who know very little English; an English-speaking lawyer who knows no French will at least be assured that all the judges will fully understand him when he argues in English. That these possibilities actually occur, is



indicated clearly by the results of a questionnaire which we sent out to French-speaking lawyers. Among other things, these results indicate that French-speaking counsel argue in English about as frequently as they prepare their factums in English.<sup>83</sup> This again indicates that some of them are induced or constrained to use English rather than their first language in oral argument.

There are a number of approaches which might be suggested towards overcoming some or all of the language difficulties which we have described. Certainly the most idealistic would be to insist that the Court's judges be thoroughly fluent in both English and French. Even if it were considered impractical to make bilingualism a qualification for all places on the Court's bench, one might at least insist that the panels of judges which hear cases pleaded by French-speaking Quebec lawyers, or for that matter French-speaking lawyers from any other part of Canada, exclude any judges whose understanding of French is inadequate. Even with the Court's current personnel it might be possible to follow this rule at least for five-judge panels, although by doing so it would probably mean that the same five judges would hear all such cases and this would seriously reduce the availability of these judges for the Court's other work. Also, merely requiring that there be available a panel or quorum of bilingual judges would not solve the problem for cases in which the whole court sits. Surely it is as important, if not more important, that a French-speaking person be assured of the most effective kind of hearing in a constitutional case where the full court is present, as in a private law case where only five judges normally attend.

The imposition of a fairly stiff linguistic requirement on the selection of judges would certainly raise some recruitment problems. As we pointed out earlier in this chapter, the field of eligible and promising candidates for positions on the Supreme Court is already severely limited by certain political and professional factors. One might question whether it is wise to reduce the field still further by adopting a bilingual requirement for Supreme Court membership. A partial answer to this point would be to advocate that some of the political and geographic considerations which now are responsible for drastically narrowing the field be dropped and replaced by more appropriate criteria among which would be an ability to speak the country's and the Court's two official languages. But if this were accepted as a legal or conventional ingredient of appointment policy, there would be serious practical difficulties in applying a meaningful language test. The only kind of test which is likely to be acceptable to the kind of persons who are good candidates for Supreme Court appointments would have to be an informal one based primarily on the man's reputation and reputation is not always a reliable guide to a person's real linguistic versatility. Perhaps the least that could be expected, given the shortage of French-speaking talent on the Court, is that judges selected to fill Quebec vacancies on the Court be at least fluent in French if not thoroughly bilingual. It could scarcely be contested that such a requirement is less likely to be violated by the Quebec government if it has some share in selecting

Quebec jurists for the Court, than if they are chosen solely by the federal government.

If one gives up, at least as a short-run possibility, the idealist approach of eliminating the language problem by establishing a completely bilingual judiciary, consideration must be given to the establishment of a translation system for oral proceedings. Indeed this proposal would merit consideration even if the Court's bench were fully bilingual, for in that event there would still be the problem of counsel not understanding each other when they spoke different languages and one or both sides were not bilingual. Objections to the proposal of using a system of simultaneous translation similar to that which is now available to Members of Parliament are likely to turn primarily on the difficulty—some might say the impossibility—of providing translations of legal arguments which are both instantaneous and accurate. Those who are fully bilingual and well trained in law know how difficult it is even with ample time for research and reflection to render legal terminology from French into English or English into French. The person or persons providing the translation would have to be quite well prepared in law as well as being first-class linguists, and even then such persons, no matter how well qualified, would often stumble; in some instances they would undoubtedly be unable in their translations to come very close to catching the real tone and direction of the rapid, conversational exchanges, between counsel and the bench. And yet while the weight of these considerations cannot be underestimated, one must still ask whether the inaccuracies and gaps which would inevitably be present in simultaneous translations would result in a lower level of comprehension than that which now exists without translations. We might also note that a translation service would be provided for only that relatively small percentage of cases in which there is a language barrier between the counsel or between counsel and members of the bench. The personnel hired for this purpose would have to be of rather high professional achievement and thus could, when not engaged in providing translations, usefully augment the Court's research staff.

In this study we were not able to carry out a detailed comparative investigation of the treatment of language problems in other jurisdictions; the secondary source materials on this subject are extremely limited. Moreover, we have reason to believe that some dimensions of the Supreme Court's language problem are unique. Unlike the senior courts of other multilingual countries such as Switzerland and Belgium, Canada's Supreme Court sitting in bancs of five or more judges must adjudicate cases in which oral argument is usually the lengthiest and most decisive stage of proceedings. In Switzerland's Federal Tribunal which, with the Confederation's three official languages<sup>84</sup> represented on its bench,<sup>85</sup> perhaps comes closest to the Canadian Supreme Court's situation, "oral argument by counsel, when heard [*sic*] at all, is treated lightly. In the public law section none is allowed. In the civil law section it comes after the case has been digested by the reporter judge and immediately before he

presents his already prepared report. In strong contrast to modern U.S. practice, no judge interrupts an attorney's [*sic*] argument by questions or guides him in any way."<sup>86</sup> The principal form of public debate in the Swiss system is that which takes place among the judges when the reporter judge's opinion is reviewed by his colleagues. In these public judicial conferences French and German are intermingled (in practice Italian is not used) and no translation service is provided.

We do find a translation service used, however, in oral proceedings before the International Court of Justice at The Hague, where the two official languages are French and English. Article 58(1) of the Court's Rules provides that: "In the absence of any decision to the contrary by the Court, or by the President if the Court is not sitting at the time when the decision has to be made, speeches or statements made before the Court in one of the official languages shall be translated into the other official language; the same rule shall apply in regard to questions and answers. The Registrar shall make the necessary arrangements for this purpose."<sup>87</sup> In practice these translations take the form of written translations prepared on the spot and distributed to the participants in the case. Shabtai Rosenne describes the procedure as follows: "The remarks of the President and his colleagues are translated into the other official language immediately; speeches are broken off at ten or fifteen minute intervals for translation. Although printed versions of the speeches are rapidly prepared and circulated it would be a mistake to consider the oral hearing as nothing more than a continuation of the written pleadings."<sup>88</sup> We should note that this type of written translation is likely to be less manageable in the Supreme Court of Canada than it is at The Hague, for in the International Court oral proceedings lay a greater stress on formal, prepared addresses by judges and counsel than on informal discussion between bar and bench. Still there is considerable scope for judicial interrogation of counsel and we should not lose sight of the fact that this stage of oral argument is often there, as in Canada, a critical stage in the adjudication of a case. There may well be merit in carrying out a closer study of the International Court's treatment of translations with a view to adapting some phase of it to the Supreme Court's purposes.

Short of translations there are two more modest ways of compensating for the lack of complete bilingualism among the Court's bar and bench. One very simple and inexpensive device would be to record the oral proceedings. Without making any written transcript, let alone translation, of the recording, judges could at the very least play back the tape after the hearing (or even during an adjournment) to go over some portion of the argument which they might have missed (or forgotten) when it was delivered in Court. This could surely assist the English-speaking judge who has difficulty in following the rapid delivery of French-speaking lawyers. It would be an even more valuable aid if such a judge were assisted in preparing his opinion by a French-speaking law clerk.



In the United States Supreme Court each argument is recorded and although no transcription is made, "The tape is available to be re-played in chambers by any Justice who wishes to hear the argument again. This often proves helpful in the drafting of opinions."<sup>89</sup> Thus aside all together from their usefulness in overcoming some of the judges' language problems, recordings of oral arguments might well be of general value to the whole Court in the preparation of opinions. No record of any kind is now kept of the substance of oral arguments in the Court; tape-recordings of hearings would be a relatively painless way of making an invaluable addition to the Court's permanent record of its own proceedings.

A final suggestion for reducing the severity of the language problems which may exist during some hearings would be to develop the Court's procedures so that the oral stage comes to play a less significant role than the written submissions. Language disabilities are apt to be less severe in reading written material than they are in following oral arguments. As we pointed out above, while there may be several English-speaking members of the Court who have considerable difficulty following spoken French, there are few, if any, who could not read French language materials and, further, when they encounter difficulties in a written text it is quite easy to consult a dictionary, or a French-speaking colleague (or even a bilingual law clerk!). The same general point would also hold true of lawyers who have difficulty following oral agreements in French or English. Certainly a minimal move in the direction of reducing oral arguments (and one which would have attractions beyond anything that it might contribute towards easing the language problem) would be to cut down the amount of time spent in reading authorities.

As with the suggestion of recording hearings, a shift in emphasis from oral argument to the preparation and study of written presentations might bestow broader benefits upon the Court. Of course, one's assessment of the consequences of such a shift will necessarily depend upon one's ideal of the appropriate adjudicative style for the Court. Those reared in the Anglo-Canadian tradition of legal practice are apt to look upon any diminution in the significance of oral agreement as cutting at the very heart of the process of litigation. However, against the traditional image of the barrister as the skillful court room debater might be placed some consideration of the special functions and problems of a highest appellate court responsible for settling the most contentious legal problems produced by a bicultural and federal country. In this context, as we have suggested earlier, it might be appropriate for the Court to develop procedures which concentrate more of its energies on carefully researching the problems which come before it and less on umpiring the points raised by lawyers (who may not be able to understand each other) in oral debate.

A relatively easy and uncontroversial step could be taken in the general direction of reducing the importance of the oral stage of proceedings by permitting the respondent to see the appellant's *factum* before submitting his own so that he would have an opportunity



before entering the court room of replying to any new points raised by the appellant. This change in the Court's rules has been recommended before and, indeed, is consistent with practice both in the United States Supreme Court and The Judicial Committee of the Privy Council. What better credentials could a proposal for reform possibly have?

*a) Conferences and opinion-writing*

Between the completion of the hearing and the announcement of the Court's final judgment, a period of some weeks or months may lapse—a period which will often span two of the Court's sessions. During this period there will be a considerable amount of collaboration and mutual consultation among the judges in the process of reaching a decision on a case. The conferences which take place in the Supreme Court are not nearly as extensive or systematic as those which are held in the Supreme Court of the United States. But a rough pattern can be traced. Usually the judges who have sat for a case will hold a brief informal meeting after oral agreement is completed. The main purpose of this conference is to see how the judges are generally disposed towards the case and, if there seems to be a fairly clear consensus, to agree among themselves as to which judge will write the Court's opinion. If the case proves to be more difficult, the judges might discuss the issues again at a later conference after they have had an opportunity to clarify their respective views and perhaps to draft and circulate tentative opinions. Often, although not regularly, during a session conferences will be held at which the judges review the progress they have made on some of the most difficult problems currently before the Court. Throughout this process a considerable effort is made to achieve unanimity among the judges who are participating in a decision, or, where this is not possible, to reduce the number of divisions among the judges on a particular case. Part of this effort is the circulation of draft opinions among the judges before judgments are finally written.

This degree of collegiality in the Supreme Court's decision-making certainly exceeds that which takes place in England's highest appellate courts. In the House of Lords, for example, judges circulate their opinions, but after they are finally written; formal conferences are rare and it is unusual to attempt to reach agreement on an "opinion of the court"—in most cases "each judge is merely preparing to express his individual views."<sup>90</sup> On the other hand, conferences in the United States Supreme Court play a far more central role in decision-making than they do in the Canadian Court. There the *full* Court attends regular weekly conferences at which petitions for *certiorari* are discussed and voted upon. All the judges express their views on the cases recently argued in the Court and on opinions which are being formulated, and when the Court's consensus or divisions become clear, opinion-writing assignments are made so that one judge is charged with writing "an opinion of the Court" or at least a majority opinion. It would be out of place here to go very deeply into the pro's and con's of these two contrasting approaches to

judicial decision-making and build a case for reforming the Canadian Supreme Court on the pattern of either the British or American model. However we would like to indicate the way in which the Supreme Court's system, or lack of system, in this phase of its operations may affect its capacity for contributing to biculturalism.

The point to be brought out here is that if one takes seriously the possible contribution which a general court of appeals for all of Canada might make to the fruitful interaction of the country's two main legal traditions—the English common law and the French civil law—then it could be argued that the Court's mode of operation should be adjusted to create greater scope and opportunity for interaction among the judges in the process of working out decisions. It is appropriate to recall here the words of Chief Justice Rinfret which we quoted above describing the advantages which members of the Court derived from the opportunity presented in the Court's conferences for comparing the common-law and civilian approaches to particular legal problems.<sup>91</sup> These comparative law benefits might well be extended if the Court's conferences were held more frequently, involved more intensive discussion of individual cases and opinions, and in general became a more regular feature of the Court's decision-making procedure.<sup>92</sup>

But as we have seen in tracing the history of Quebec attitudes to the Supreme Court, Chief Justice Rinfret's enthusiasm for the comparative law advantages of the Supreme Court's practice represents only one school of thought; there are certainly other Quebec jurists whose first priority is not the mutual impregnation of common-law and civil-law concepts, but the preservation of the purity of Quebec's civil-law system. Those who share this attitude are inclined to advocate Supreme Court reforms which would increase and perhaps even formalize the division of the Court into specialized bancs or chambers at least for the purpose of adjudicating private law issues in the two major traditions of legal culture. Professor Albert Mayrand, for example, has proposed establishing within the Court two chambers, "one for common law and one for civil law, or at least requiring that civil law cases be heard before a majority of judges specializing in civil law."<sup>93</sup> But even if this approach were adopted there would still be a need for the full court—including both its common-law and civil-law divisions—to come together for the purpose of adjudicating issues which are of general federal import and especially those which raise important questions of constitutional law.

In those areas where there is likely to be a continuing interest in having a full national court make decisions, there is much to be said for procedures which increase the collective nature of the Court's approach to decision-making. By talking out these issues more thoroughly in conference and working even more deliberately and strenuously at defining a consensus (if not for the whole Court, at least for a majority) both as to a decision's reasons and its conclusions, the outcome of the Court's decision-making will be more than simply the mechanical aggregation of nine separate opinions. If the country's jurisprudence relating to what are indisputably the common

concerns of all its citizens is to reflect some interaction of English and French common-law and civil-law norms and precepts, the governing opinions of its highest court must be the outcome of a process of collaboration and accommodation among representatives of the two cultures. Such a process is surely more likely to occur if all the judges meet *regularly* during each session and devote much more of their energy to finding mutually acceptable solutions to the major issues—particularly in the public law field—argued before the Court.

The adoption of a policy of extending and regularizing the Supreme Court's conference system would, like a number of the other proposals considered in this report, have more general benefits than those affecting the Court's bicultural capacities. Bora Laskin, perhaps the leading Canadian student of the Court, and now himself a member of Ontario's Court of Appeals, has used these words to stress the general rewards to be gained by increasing the Court's procedures for consultation and discussion: "The advantages of a system of consultation in terms of time for reflection, of preliminary reconciliation of positions, and of clarification of principles, of providing a group opportunity for assessing immediate and long range consequences—in other words, of enabling the Court to act as an entity—are beyond dispute."<sup>94</sup> Laskin and others have drawn attention to the tendency for the lack of consultation and conferences in the Court to produce a number of repetitive and overlapping opinions for a given case. Since the Court's earliest days its practice of *seriatim* opinion-writing has caused considerable disgruntlement among members of the country's legal profession.<sup>95</sup> While nowadays few Canadian jurists would be attracted to the Privy Council's practice of presenting every decision as the opinion of a unanimous court, many would like to see the Supreme Court develop an opinion-writing method which might make it easier for both practising lawyers and the interested public to identify clearly the Court's largest common denominator of opinion on a given issue. The Court's failure to produce "an opinion of the court" for every case can be overdrawn;<sup>96</sup> what is more generally advocated is a more economical use of judicial energy in opinion-writing and a more self-conscious effort to produce only those opinions which will indicate the really significant differences among the Court's members.<sup>97</sup> No doubt before the Court can act "more as an entity" (to use Justice Laskin's words) there must be an increase in the amount of leadership exercised by the Chief Justice in effectively co-ordinating the work of his colleagues.

#### *d) Judgments and reports*

The final stage in the Court's adjudication of a case is reached when the Court<sup>98</sup> delivers its judgment. Compared with the dramatic and rather elaborate "opinion days" which the American Supreme Court stages almost every Monday when it is in session, the Canadian Supreme Court's method of announcing its judgments is very informal—one might almost say casual. There is no regular day upon which judgments are delivered, opinions are often filed without being read, counsel do not always attend<sup>99</sup> and the whole event, even when the



Court is bringing down its decision in an important constitutional case, receives very little public notice.

The language used when the Court delivers its judgment will depend on the presiding judge and the language used in the litigation. If the presiding judge is French speaking and French was the principal language used in the pleadings, then the judgment will probably be delivered in French. Otherwise it will be in English. No translations are provided.

Given the inconsequential nature of this stage of proceedings there is little point in concerning ourselves with the possible lack of bilingualism that may exist here. There is, however, some merit in considering some alterations in the method of delivering judgments which might make this stage of the proceedings a more integral and impressive part of the Court's routine. Surely the judgments of a Court which can have such significant consequences for the whole nation, particularly for its constitutional structure, should attract the interest of more than the immediate parties to a case. One way of engaging the attention of a broader public might be to make the oral delivery of judgments a more auspicious occasion. If this were done so that in a more public sitting, at regular intervals, judges read their opinions in part or in full, it might be well worthwhile providing some form of translation. Probably the most practical form of translation would be a written translation of each judge's opinion distributed beforehand to those attending. But this leads to a much more pressing question relating to bilingualism: the absence of any translations of the judges' opinions in the official reports of the Court.

The Registrar and Deputy Registrar are charged with the responsibility of producing the official reports of the Court's judgments.<sup>100</sup> The *Supreme Court Reports* are published as a separate series of the Canada Law Reports.<sup>101</sup> At present this series is jointly edited by a French Canadian and an English Canadian lawyer, M. François des Rivières, the Deputy Registrar of the Court and Mr. Mills Shipley. A high proportion but by no means all of the Supreme Court's decisions on the merits are published in the Reports. The *Supreme Court Reports* for the years 1950 to 1964 (inclusive) reported 1001 judgments and listed 415 unreported judgments.<sup>102</sup> The reported judgments include all the important cases which the Court has settled, especially constitutional cases, important issues of federal law and cases in which the Court was divided.<sup>103</sup> While the editors take the initiative in the selection of cases, members of the Court's bench could certainly intervene if they thought an important case was being overlooked. Records of unreported judgments can be found in the Supreme Court's library.

One can hardly overestimate the importance of the *Reports* as the indispensable medium through which the Court's decision in a particular case becomes part of the country's basic jurisprudence. When we take into account the respect which Canadian jurists in French<sup>104</sup> and English Canada have shown for the principle of *stare decisis*, both in the sense that lower courts are bound by the decisions of higher



courts and that the highest court, the Supreme Court of Canada, is bound by its own previous decisions, it is clear that the Supreme Court's reported decisions will contain many of the governing precepts of Canadian law. Not only do the Supreme Court's reported judgments have a legislative function within Canadian jurisprudence but they affect potentially every area of law—federal and provincial; and, in the area of constitutional law, the Court's judgments on the division of powers are rendered doubly important by virtue of the fact that they are not easily amended by the elected legislatures.

Given then the unquestionable importance of the Supreme Court's decisions for the country's basic legal structure, we do not hesitate to record here as one of the Supreme Court's most serious inadequacies from the point of view of bilingualism the absence of any sustained or balanced attempt to report the Court's decisions in Canada's two "official" languages. Since most of the Court's members are English-speaking and these English-speaking judges never write their judgments in French,<sup>105</sup> this means that the bulk of the Court's judgments are reported in English. The French-speaking judges write opinions in both languages; if the case they are deciding is from Quebec, in all likelihood their opinion will be written in French,<sup>106</sup> whereas if it deals with a matter of national interest, they may express themselves in English. No translations are provided.

The only deviation from this pattern occurred in the Court's early years when some of the opinions expressed by the Quebec judges in French were translated into English and both versions were published in the *Supreme Court Reports*. This development apparently was prompted by the complaints of English-speaking lawyers against the Court's first few publications of opinions written only in French. The editor of the *Canadian Law Journal*, reviewing the first volume of the *Supreme Court Reports*, chastised the editor for reporting one of Mr. Justice Fournier's judgments in French only. "If some of the judgments of the Supreme Court are to be published in a foreign tongue," he exclaimed, "it will be necessary for those who are in charge of the education of law students in the English speaking Provinces to insist upon the French language being added to the curriculum." But seeing no point in encouraging the English-speaking lawyers to become bilingual the editor concluded by warning the Court's reporter, ". . . that the major part of his readers do not know French, and are not likely to learn it simply for the pleasure of reading an occasional judgment in that language."<sup>107</sup> During the next decade the Court made only a very modest accession to this protest. In each volume of the official *Reports* one or two of the opinions written by French-speaking judges—usually on a constitutional matter, a controverted election or an Exchequer case—were translated into English.<sup>108</sup> However, English-speaking opinion must have been considerably mollified by the fact that Justice Henri Elzéar Taschereau who took his cousin Jean Thomas' place on the Supreme Court bench in 1878 wrote nearly all of his judgments in English. But Justice Fournier who was either less accommodating or less bilingual persisted in writing most of his judgments in French, and with few

exceptions these were published in the Court's *Reports* without any accompanying translations.

The only effort the Court has made to introduce some measure of bilingualism into its official reports has been in relation to the head-notes for cases. Each reported judgment is introduced by a head-note written by the editors of the *Reports*. The head-note provides a succinct summary of the controversy involved in the case together with brief paraphrases of the judges' opinions designed to illuminate the main points of law determined by the majority and the main points of dissent. For most lawyers who require a convenient guide to the Court's decisions it is an indispensable aid. Until 1963 no head-notes were written in French, even in cases in which the main judgment was rendered in French. In the 1963 *Supreme Court Reports* seven Quebec appeal cases with judgments written exclusively in French were introduced by French head-notes.

In 1964 the editors of the *Reports* were experimenting with a number of approaches to the treatment of language in the head-notes. The 1963 practice of providing French head-notes for French judgments was continued at least for three Quebec appeal cases which concerned aspects of Quebec's civil law of little interest to lawyers outside Quebec.<sup>109</sup> But, in addition to this, bilingual head-notes were introduced for the first time: in eight cases from Quebec<sup>110</sup> for which both French and English judgments had been written, the head-note was in the two languages. In six of these, the same head-note was written twice, once in each language;<sup>111</sup> in the other two the same note contained both French and English passages. Unlike the cases for which only French head-notes were provided, these cases all raised questions of some considerable interest to non-Quebec as well as Quebec lawyers.<sup>112</sup>

The editors of the *Supreme Court Reports* have continued to experiment with bilingual head-notes in the 1965 volume. For three cases involving Quebec's Civil Code only French head-notes have been written;<sup>113</sup> for a larger number of appeals French and English head-notes were prepared. But in contrast to 1964, the cases chosen for bilingual head-notes were not confined to decisions in Quebec lawsuits for which French and English opinions had been submitted. Included in this group of 11 cases were four appeals from the Exchequer Court and one from the Court of Appeal for Ontario.<sup>114</sup> In all but one<sup>115</sup> of these cases the central issue concerned some aspect of federal law, ranging from taxation through patents and immigration, to criminal law, and in eight of them the judgments had been written solely in English.

Thus the Court seems to be groping its way towards a more adequate approach to head-notes. Instead of using bilingual notes simply as a way of making the introduction of French head-notes in Quebec appeals more palatable to English-speaking lawyers by providing the latter with English equivalents for the French notes, now the Court appears to be moving in the direction of publishing both French and English notes for those cases which raise a question of general importance to all sections of the federation. But this policy hardly goes far

enough to satisfy even the most minimal standards of bilingualism. There are still many appeals both from Quebec and the other provinces which settle legal issues of great interest to French-speaking Canadians, for which French head-notes are not provided. Take, for example, the case of *Guay v. Lafleur*,<sup>116</sup> reported in the 1965 volume: in this case the Supreme Court reversed a Quebec decision which represented the first significant affirmative application of the Canadian Bill of Rights by a Canadian tribunal. Surely here was an issue about which French-speaking Canadians must have as much interest as English-speaking Canadians, and yet there was not even a French equivalent for the English head-note.

Admittedly the rather hesitant and haphazard manner in which bilingualism has been introduced into the *Supreme Court Reports* stems from the fact that the Court is still experimenting with various possible treatments of the problem. But it seems highly unlikely that these rather piecemeal approaches to bilingualism in the head-notes, depending entirely on the labours of one bilingual editor, M. des Rivières, can lead to an adequately bilingual method of reporting the Supreme Court's decisions. At the very least there is an undeniable case for providing French head-notes for *all* judgments in Quebec appeals regardless of the language in which the judgments were written. But beyond this a strong case can be made for publishing both the judgments and explanatory notes, especially for those cases concerning matters of national importance, in French and English.

If the Supreme Court is to produce a jurisprudence which can be shared by all Canadians, its decisions must be equally accessible to the country's two major linguistic groups. Up until now this condition has certainly not been fulfilled. An English-speaking lawyer could read nearly all of the Court's decisions in his first language and where the odd judgment which might interest him was written in French he was always assisted by a head-note written in English. Furthermore, outside of the official *Reports*, other series such as the *Dominion Law Reports* have provided (unofficial) translations of French judgments.<sup>117</sup> But in marked contrast to this the French-speaking lawyer, especially in matters of federal concern, has had to read nearly all of the Supreme Court's decisions in English and until recently even in judgments dealing with the most immediate concerns of Quebec civil law he has not had the benefit of explanatory notes in his own first language. Nor has he found any consistent support by way of translations in any of the other series of Canadian or Quebec law reports.<sup>118</sup> This large imbalance in the use of French and English for reporting the Supreme Court's decisions has ramifications which extend beyond the convenience of the legal profession. It is in the area of constitutional law that the almost exclusive use of English in the Supreme Court's (and the Privy Council's) jurisprudence has the gravest consequences. In our federal system the highest appellate Court's interpretation of the written constitution very often has had a decisive effect on the most crucial aspects of the division of legislative powers. So long as this is so and the operative meaning of some of the Constitution's most important clauses can



only be gleaned from judicial decisions concerning them, it is surely as important that these decisions be available in French and English as it is that the Constitution itself, the B.N.A. Act and its Amendments, be printed in the two languages of the Canadian Confederation.

If the Court were to adopt a policy of translating its judgments into one or other of the Court's official languages, these translations would have to be given official status by the Court in order to be of any real use to the profession. If this were done, it is unlikely that both French and English versions of a judgment could have the same authority. In the International Court at The Hague where the judgments are always given in the Court's two official languages, French and English, the Court always determines which text is authoritative and, "... possibly due to the speed with which they are prepared and the difficulty of rendering legal texts from one language into the other—experience has shown the need for care in using that text of a judgment or of an individual or dissenting opinion which is not the authoritative text."<sup>119</sup> There is certainly no denying the difficulties involved in producing adequate translations of legal documents, especially when the languages involved are based on essentially two different legal cultures. Ideally the best method would be to have each judge write his judgment simultaneously in French and in English without translating from one to the other. But, as we have seen, the linguistic capabilities especially of the Court's English-speaking majority are far below the standard which such a method would require. Given the present composition of the Court, the adoption of a translation policy for its judgments could not be implemented without a significant expansion of the Court's staff. Not only would the editorial staff of the *Supreme Court Reports* have to be augmented by bilingual lawyers but in addition the judges themselves, especially the monolingual English-speaking judges, would require considerable assistance—again, possibly from bilingual law-clerks—in checking the accuracy of French translations of their opinions.

The problems and burden of providing translations would be greatly reduced if they were required only for decisions which deal essentially with federal legal matters. This would meet most of the serious deficiencies in the existing situation, although there would also be a need for French translations of English judgments in Quebec appeal cases. Alternatively, the need for translations of judgments would be seriously diminished if the Court carried on the bulk of its private law and provincial law business in two specialized, English common-law and French civil-law chambers. In such a system the judgments of each chamber could be reported in the language appropriate to their respective legal traditions. The same result might also be achieved by realizing a considerable reduction in the Supreme Court's jurisdiction over areas of law subject to provincial legislative jurisdiction. But in either case, whether a bicameral division of the Court were established or the Court's jurisdiction in provincial law matters seriously reduced, an important core of federal legal issues, especially constitutional questions, would remain



for adjudication by a supraprovincial tribunal made up of representatives of Canada's two major ethnic groups. Unless Canada is committed to the English assimilation of all its French-speaking citizens who wish to be knowledgeable participants in its federal legal system, then there would appear to be an iron-clad case for publishing in both French and English the decisions of its highest tribunal which bear on the common interests of all Canadians.

## *2. Opinion of French-speaking lawyers*

In order to round out our understanding of the nature of any language difficulties which the Supreme Court might impose on French-speaking counsel, we canvassed the opinion of those who are most directly concerned—the French-speaking lawyers who in recent years have taken cases in the Supreme Court of Canada. For this purpose we drew up a questionnaire with 31 questions designed to elicit the opinion of French-speaking members of the Supreme Court bar on three dimensions of the language question: (a) the general seriousness of the language problem in the Court and the way it affects the professional work and opportunities of French-speaking advocates; (b) the actual choice of language by French-speaking counsel in oral and written proceedings in the Court and the factors which influence the choice of language; and (c) possible reforms for overcoming language difficulties.

This questionnaire was sent to all those French-speaking lawyers who had acted in Quebec cases heard by the Supreme Court between the beginning of the January term 1964 and mid-way through the January term 1965 when we completed our research. By French-speaking lawyers we mean those whose first language is French. The identification of these lawyers was based on a list of counsel for each case heard during the stated period, prepared by the staff of the Supreme Court Registrar's office. The Registrar's office assisted in selecting those counsel whose first language was French. Where there was any doubt on this point, we assumed the individual was French-speaking and sent him the questionnaire. A covering letter sent out with the questionnaire asked the addressee to return the questionnaire if his first language was not French.

Sixty-six questionnaires were sent out and in the end 40 were filled out and returned; five were sent back uncompleted by lawyers who had been mistakenly identified as French-speaking. Thus the results reported below are based on the opinions elicited from about two-thirds (40 out of 61) of our population of French-speaking counsel recently active in the Court. While we think it reasonable to assume that with a sample this large the danger of serious sampling variability is low, still we should point out the bias which might be present in this sample. The factor which is most likely to give our sample a peculiar shape is that the lawyers who completed the questionnaire may represent a disproportionately large number of those who are convinced that a language problem exists in the Court, whereas the third who did not return the questionnaire may be largely constituted by those who do not regard bilingualism in the Supreme Court

as a serious question. If this were in fact the case, then, of course, the results of our survey would unduly magnify the concern felt by French-speaking lawyers about language difficulties in the Supreme Court.

But there is another factor which tends to work in the opposite direction. If we think of the Supreme Court counsel whom we polled as constituting a sample of the whole population of French-speaking Quebec lawyers, then it is likely that this sample over-represents those French-speaking counsel who are reasonably well assimilated into the English culture (at least insofar as language is concerned). While there are no special legal requirements for those barristers who wish to practise in the Supreme Court of Canada,<sup>120</sup> the preponderance of English-speaking judges on the Court's bench, in fact, is likely to impose a bilingual requirement on French-speaking lawyers. Evidence of this is provided by the fact that only one of the forty lawyers who answered the questionnaire described himself as less than fairly bilingual.<sup>121</sup> Some further light is cast on this phenomenon by the answers we received to our question which asked the French-speaking Quebec counsel whether they felt that "language restricts the number of Quebec lawyers who are eligible for Supreme Court practice?" Three-quarters of those who replied indicated that they thought the language factor either slightly or severely limited the number of Quebec advocates eligible for Supreme Court practice.

*a) Gravity of the language problem*

Four of our questions were designed to elicit opinions concerning the seriousness of language difficulties in the Court:

Do you feel that Quebec lawyers whose first language is French are handicapped in practising in the Supreme Court?

- Yes, all of them
- Yes, most of them
- Yes, a few of them
- No, none of them

Do you think that language restricts the number of Quebec lawyers who are eligible for Supreme Court practice?

- Yes, severely
- Yes, slightly
- No, not at all

Do you feel that for yourself the fact that French is your first language puts you at a disadvantage in practising before the Supreme Court?

- Yes, it is a serious handicap
- Yes, it is a slight handicap
- No, it is no handicap at all

Do you find that the *language* problems associated with Supreme Court practice are serious enough for you to advocate either reforms of the Supreme Court or of the Canadian judicial structure?

- Yes
- No

The answers which we received to these questions are tabulated in Table III.4. We have separated the responses of the 24 lawyers who declared themselves to be fully bilingual from those of the other 16 lawyers who described themselves as less than fully bilingual.

The answers which we received to these four questions do not indicate that there is an overwhelming body of opinion among French-speaking lawyers which looks upon the lack of complete bilingualism in the Court as an enormously serious problem. The figures in the first "yes" columns for the first three questions show that a minority of the lawyers polled believe that French-speaking lawyers are severely handicapped because of language insofar as Supreme Court practice is concerned. But against this we must balance the fact that well over a majority of the 40 lawyers gave affirmative answers to all four questions.

Indeed, nearly half (19 out of 40) thought that most French-speaking lawyers were handicapped because of language, and three-quarters believed that this reduces the number of Quebec lawyers interested in practising in the Supreme Court. There were fewer who looked upon themselves as personally handicapped than who felt that the Quebec profession was generally affected by language difficulties. Still, slightly more than half did feel at some disadvantage because of language and about the same percentage thought the language problem serious enough to require some kind of reform.

When we correlate the answers to the different questions, it is interesting to observe that the group which desired reform did not include all of those who considered themselves either slightly or seriously handicapped because their first language was French. Six of those who felt under no handicap at all advocated reforms, while at the other extreme one of those who described himself as at a serious disadvantage because of language did not advocate any alterations in the Court's practice or personnel. Clearly the lawyer's attitude to Supreme Court reform is likely conditioned by his temperament and basic social and political outlook as well as by his experience before the Court.

As might be expected, a much higher proportion of the fully bilingual lawyers than of the less than fully bilingual lawyers denied being under any personal disadvantage because of language. Still, it is remarkable that more than a third of the fully bilingual group *did* consider themselves at a disadvantage because of language. "Fully bilingual" was explained on the questionnaire to be the appropriate designation for those who "would not hesitate to plead a case in English." A number of the fully bilingual lawyers who appended notes or memoranda<sup>122</sup> to the questionnaire explained that while they would not hesitate to use English when pleading in the Supreme Court and were convinced that by doing so they improved their chances of winning their client's case, nevertheless they found it difficult to communicate their arguments adequately in English especially when they were concerned with expounding some aspect of Quebec's civil law.

We should also note that the lawyers who belong to fairly small partnerships or else practise alone tend to be less bilingual and



Table III.4  
Opinion of French-speaking Quebec counsel on seriousness of the language problem in the Supreme Court

French-speaking Counsel	Are French-speaking counsel handicapped, because of language in Supreme Court practice?			Does language restrict number of Quebec lawyers eligible for Supreme Court practice?			Are <i>you</i> at a disadvantage in Supreme Court practice because your first language is French?			Is language problem in Supreme Court serious enough to call for reforms?		
	Yes all	Yes most	Yes a few	No none	Yes severely	No slightly	Yes seriously	No slightly	None	Yes	No	
Fully bilingual lawyers	3	6	10	5	8	8	2	7	15	13		11
Fairly or slightly* bilingual lawyers	3	7	1	5	4	10	8	4	4	9		7
Totals	6	13	11	10	12	18	10	11	19	22		18

\* Of the 16 lawyers in this group, 15 described themselves as fairly bilingual and one as slightly bilingual.

consequently are more likely to feel handicapped because of language. When we correlated the answers to our question relating to the kind of practice each lawyer was engaged in with the answers to the question concerning their proficiency in English, we found that there was a direct relationship between bilingualism and the size of the firm.<sup>123</sup> Of the 14 lawyers who practised alone or else in a partnership of less than five lawyers, only four said they were fully bilingual, whereas 14 of the 20 lawyers who practised in larger firms and all of the lawyers employed by government—federal and provincial—described themselves as fully bilingual.

Another factor which appears to have some bearing on the difficulties encountered by French-speaking members of the Supreme Court bar is the lawyer's area of specialization. Only about half of the lawyers in our sample described themselves as specialists.<sup>124</sup> Table III.5 shows that among the specialists, those who concentrate on civil law are most apt to feel disadvantaged by language difficulties in the Supreme Court. All seven of those who do the bulk of their work in the civil-law field feel either severely or slightly handicapped by the language problem. Among this group of seven were the two fully bilingual lawyers who stated that they were at a severe disadvantage because of language when practising in the Supreme Court.

One of the variables which might be expected to have a bearing on the case with which French-speaking lawyers practise in the Supreme Court, is the amount of experience which they have had in the Court. But whether experience was measured in terms of the number of years since a lawyer's first case in the Court or the total number of cases he has taken, we did not find any evidence of a very marked correlation between experience and language difficulties. For example, of the 21 lawyers who indicated that they felt at some disadvantage—slight or severe—because of language, 12 had taken five cases or less in the Court and the remaining nine had taken more than five cases. Again, if we narrow this down to the 10 who felt severely handicapped, we find that four of this group have taken more than five cases and, indeed, three of them have been practising in the Court for more than a decade. Thus while there may be a slight tendency for the younger, less experienced French-speaking counsel to feel more encumbered by language difficulties in the Court, still it is evident that a number of leading Quebec counsel who have been taking appeals in the Supreme Court for 10 years or more have not been able to make a completely satisfactory adjustment to the predominantly English-speaking character of the Court.

We further inquired of the lawyers whether they thought that "those lawyers who are at a disadvantage in the Supreme Court because of language, experience this more when particular judges are chosen to sit on their case." Twenty-four replied affirmatively to this question, indicating that language difficulties did vary with the composition of the bench. This provides some further evidence for the point made earlier<sup>125</sup> that even with the Court's existing personnel, the panels which are established for Quebec appeals could be so

Table III.5

Language difficulties of French-speaking counsel specializing in different areas of law

Area of specialization	Does the fact that French is your first language put you at a disadvantage in practising before the Supreme Court?		
	Yes serious	Yes slight	No none
Civil law	3	4	
Criminal law	2	1	3
Commercial and corporation law		1	3
Administrative and constitutional law		2	1
Labour law		1	1

arranged as to minimize the difficulties experienced by French-speaking counsel.

While a clear majority of the lawyers believed that the language factor had some deleterious effects on French-speaking advocates in the Supreme Court, almost none of them reported that language problems had deterred them from taking cases to the Supreme Court. Only one lawyer gave an affirmative reply to the question, "Has the language problem ever caused you to drop a case in which you would otherwise have acted as counsel before the Supreme Court?" None thought that his firm had dropped cases for this reason<sup>126</sup> and all denied having ever been reluctant to advise a client to appeal a case to the Supreme Court because of language difficulties.<sup>127</sup>

Finally, turning to the Court's services, we find, first of all, that nearly all the lawyers reported no experience of language difficulties in their dealings with the Court's administrative staff.<sup>128</sup> This is a fairly clear indication of the quite high level of bilingualism found among the Court's non-judicial personnel at all levels. Only two lawyers indicated that they had any difficulty at all—and one of these specified that he had found that some of the Court's library staff were unable to speak to him in French.

A considerably higher level of concern was shown with regard to the reports of the Court's judgments. To our question "Do you find that the lack of official translations of reported decisions of the Supreme Court imposes a burden on you?", 11 replied that the absence of translations imposed a slight burden on them and two regarded this as a severe burden. While this means that a substantial majority did not feel inconvenienced by the lack of official translations, still we should note that an equally large majority (26 out of 39)<sup>129</sup> replied affirmatively to the question "Do you think that official translations



of reported judgments should be included in the *Supreme Court Reports*?" Almost as many (24) reported that they found the present treatment of language in the head-notes of the *Reports* inadequate.<sup>130</sup> The fact that a relatively high proportion of lawyers favoured the introduction of translations and the extension of French head-notes, while a relatively low proportion actually felt themselves disadvantaged by the absence of French translations or equivalents, suggests that many of those who favour reform in this area do so more on the basis of principle than for the sake of their own personal convenience.

*b) Choice of language by French-speaking counsel*

A second section of our questionnaire was designed to provide some information on the actual use of language by French-speaking counsel when pleading cases in the Supreme Court of Canada. We wished to see not only what language—French or English—they chose for their written factums and oral pleadings but also how they explained this choice. Also, we were interested in discovering how French-speaking counsel's choice of language in Supreme Court proceedings might differ from their use of language when pleading in Quebec courts and if over time there had been any change in their choice of language for Supreme Court cases.

A fairly clear (and rather predictable) pattern emerges from the answers we received. The replies to the various questions, when put together, indicate that the frequent participation of less than fully bilingual English-speaking judges in Quebec appeals causes many French-speaking counsel, especially those who are fully bilingual, to express themselves in English rather than French. The evidence further suggests that the less than fully bilingual French-speaking lawyers are relatively reluctant to use English but are most likely to feel constrained to use English in oral argument rather than in preparing their factums. We shall gain a little more insight into this pattern by looking briefly at the answers which we received to the various questions.

In Table III.6 we have tabulated the replies to the questions which asked the lawyers to indicate the factors influencing their decision to plead in French or English. The most frequently checked factor for both written and oral pleadings was the lawyer's assessment of the linguistic capabilities of the judges sitting for his case: 29 indicated that this factor had influenced their choice of language in preparing factums, and one more than that acknowledged it as affecting the choice of language in oral pleadings. To further questions asking "Of the factors listed, is there one which more than any other has influenced your choice of language?", the replies overwhelmingly pointed to the lawyer's calculation of the judges' linguistic capacity as the crucial factor. Twenty-two of the 34 lawyers who could single out one factor as most influential in the preparation of factums identified the judges' expected linguistic ability as the key variable; similarly for oral pleadings, 24 of 34 named this same factor. For neither written nor oral pleadings was any other factor mentioned as most influential by more than five lawyers.

Table III.6  
Factors influencing French-speaking counsel's choice of language

In written briefs		In oral argument	
Have any of the following factors ever influenced you to use a particular language in preparing a factum for a case you are taking before the Supreme Court? (Please check "yes" or "no" for each factor listed.)	Yes No	Have any of the following factors ever influenced you to use a particular language when orally arguing a case in the Supreme Court? (Please check "yes" or "no" for each factor listed.)	Yes No
1. Your own linguistic capabilities	24 16	1. Your own linguistic capabilities	25 15
2. The language used in the pleadings in the courts below	14 26	2. The language used in the pleadings in the courts below	12 28
3. The language used in the judgments of the courts below	11 29	3. The language used in the judgments of the courts below	7 33
4. Your client's language	14 26	4. Your client's language	11 29
5. The language used by your adversary (either counsel or litigant)	10 30	5. The language used by your adversary (either counsel or litigant)	12 28
6. The subject matter of the case (either facts or law)	10 30	6. The subject matter of the case (either facts or law)	8 32
7. Your assessment of the linguistic capabilities of judges sitting for your case	29 11	7. Your assessment of the linguistic capabilities of judges sitting for your case	30 10
8. The linguistic capabilities of your own stenographic staff	5 35	8. The language used by judges in asking you questions	25 15
9. The language you are planning to use when arguing the case orally	26 14	9. The language in which you wrote your factum	20 20
10. Other factors (please specify)	4 36	10. Other factors (please specify)	2 38

Where the French-speaking lawyer's decision to present his *factum* in English is based on his estimate of the languages spoken by the bench, his estimate will likely be based on a rather general speculation about the predominantly English-speaking character of the Court's personnel. It would appear, for instance, that many of the lawyers anticipate a bench which will make it incumbent upon them to argue in English if they are going to maximize their client's opportunities and they therefore prepare their *factums* in English. We find that among the factors influencing the lawyers' choice of language for *factums*, the factor selected almost as often as the judges' linguistic capacity was the language the lawyer planned to use in oral argument. On the other hand in oral pleadings the lawyer's decision to express himself in English is apt to be based on his immediate perception of the judges' capacity for understanding his French. Twenty-five of the lawyers indicated that the language spoken by the judges during the hearing influenced their own choice of language. Certainly a fully bilingual French-speaking lawyer questioned in English would likely reply in English. Further, a Quebec lawyer who was not so confident about his competence in English might feel it necessary to address the bench in English in order to make the greatest impact on all of its members.

The other factor which a majority of the respondents indicated as one of the influences on their choice of language for both *factums* and oral pleadings was the lawyer's own language capabilities. Certainly those lawyers who are only fairly bilingual, regardless of how they estimate the judges' ability to follow them in French, might hesitate to use English. Indeed all but one of the 10 lawyers who denied that their choice of language was ever influenced by their assessment of the judges' linguistic ability pleaded all of their cases in French and seven of these were less than fully bilingual.

Further evidence of the extent to which the lawyer's linguistic ability will influence his choice of language is provided by the data set out in Table III.7. In this table we have set out the answers received to questions asking the lawyers to indicate the actual language or combination of languages which they have used for written and oral pleadings. We have separated the replies of the fully bilingual lawyers from those given by the group who stated that they were less than fully bilingual. The figures show that it is the fully bilingual lawyer who is most apt to adjust to the situation he anticipates in the Supreme Court and plead his case in English. In preparing their *factums* most of the fairly or slightly bilingual lawyers (11 out of 16) used French exclusively, whereas nearly all of the fully bilingual group (22 out of 24) wrote some *factums* in English and well over half (15 out of 24) used English for most of their *factums*. In oral pleadings this contrast was not quite so sharp: here the use of English by a member of the bench or by the lawyer representing the other side of the case has the effect of inducing more of those who are not fully bilingual to use some English.

One might react to this phenomenon by praising the linguistic dualism of the Supreme Court's bench as a spur to bilingual performances



Table III.7  
Choice of language by French-speaking Quebec counsel for factums and oral argument in the Supreme Court

French-speaking Quebec Counsel	Choice of language for factums					Choice of language for oral argument				
	1	2	3	4	5	1	2	3	4	5
	Always French	Usually French	$\frac{1}{2}$ French and $\frac{1}{2}$ English	Usually English	Always English	Always French	Usually French	$\frac{1}{2}$ French and $\frac{1}{2}$ English	Usually English	Always English
Fully bi- lingual lawyers	2	5	2	8	7	1	4	5	10	4
Fairly or slightly bi- lingual lawyers	11	2	1	1	1	8	5	3	0	0
Totals	13	7	3	9	8	9	9	8	10	4

on the part of its bar. But such a reaction would have to ignore the fact that it is only French-speaking counsel who feel constrained or are induced to use both French and English during Supreme Court hearings—an English-speaking lawyer who is less than fully bilingual will not experience the same constraint or incentive to express himself in French. A more realistic reaction would be to take note of the fact that it is in the oral stage of proceedings that French-speaking counsel most often feel obliged to use their second language, English. It might then be argued that if this means that some French-speaking lawyers are prevented from presenting their client's case in the most effective manner and if in the short-run this situation cannot be overcome by staffing the Court with more bilingual judges, then the most immediate way of mitigating the French-speaking counsel's difficulties would be through the provision of some kind of translation system during oral argument.

The replies we received to questions concerning the French-speaking lawyer's use of language in the Quebec courts provide further evidence of the Supreme Court's tendency to incline French-speaking lawyers, who would normally plead in French, to use English when taking appeals to the Supreme Court. To the question "What language do you generally use when practising in the Quebec Courts?", 22 replied that they always used French and the other 18 stated that they usually used French. There was no significant difference here between the fully bilingual group and those who were less than fully bilingual. In a further question we tried to find out if lawyers actually switched from French into English when taking appeals to the Supreme Court. In Table III.8 we have tabulated the replies to this question and from this we can see that almost all of those lawyers who pleaded cases in English before the Supreme Court generally pleaded the same cases in French in the Quebec courts. All but three of those to whom this question was applicable stated that in the Quebec courts they had used French for all or most of those cases in which at the Supreme Court level they later used English. As we would expect, this tendency was much more marked among the lawyers who are less than fully bilingual.

The pattern of responses to these questions enables us to isolate more factors inherent in the Supreme Court itself which tend to influence the French-speaking lawyer's decision to express himself in English before the Supreme Court. The factors inherent in any given legal controversy which might influence the choice of language should be equally operative in both the Supreme Court and the Quebec Court. But if that is true, then those factors inherent in the case rather than in the Court—factors such as the subject matter of the case, the client's or adversary's language and the language used in the judgment or pleadings below—cannot account for the striking contrast between French-speaking counsel's choice of language in the Quebec courts on the one hand and in the Supreme Court on the other. Whereas at least half of the French-speaking lawyers used English half of the time or more in the Supreme Court not one of them used English this often in the Quebec courts. The key explanation of this

Table III.8

French-speaking lawyers' choice of language in Quebec courts for cases in which English is used in the Supreme Court

	Of those cases in which you have used English (for either your factum or oral argument) have you pleaded any of them in French before the Quebec courts?				
	Yes all	Yes most	Yes a few	No none	Not applicable
Fully bilingual lawyers	5	14	2	1	2
Fairly or slightly bilingual lawyers	7	3	0	0	6
Totals	12	17	2	1	8

contrast must be the linguistic capabilities (actual or expected) of the Supreme Court judges.

Finally, in this section of our questionnaire dealing with the lawyer's actual choice of language, we tried to ascertain whether there had been any tendency for the pattern of language used to change over time towards greater use of French or English, and, if so, to see how the lawyers accounted for such changes.<sup>131</sup> Only 13 of the 40 lawyers who returned questionnaires answered this question. Twelve of them reported that they had presented more of their Supreme Court cases in French in recent years and one stated that he had tended to shift to a greater use of English. The latter did not give any explanation for his increased use of English. Nine of the 12 who reported a greater inclination to plead in French offered explanations for their change. Six of these explanations were couched in nationalist terms, using such phrases as "the spirit of the Quiet Revolution," "the fear of separatism," and "duty to mother tongue." The other three referred to a greater use of French by the Court resulting either from the increased specialization of the Quebec judges in Quebec appeals or the increased silence of the monolingual English-speaking judges assigned to Quebec cases.

It is interesting to observe that five of the six lawyers who offered nationalist explanations for their growing determination to plead cases only in French were less than fully bilingual. This suggests that it is among the segment of the Quebec legal profession that is not fully assimilated into the English-speaking culture that disgruntlement with the linguistic inadequacies of the Supreme Court bench is most intense. As we suggested at the beginning of this section, it is this part of the Quebec profession that is probably under-represented among those Quebec lawyers who practise in the Supreme Court. But the proportion of French-speaking professionals in Quebec who are not well assimilated into the English-speaking culture may be rising. If it is, then it will probably lead to an increase

in the proportion of French-speaking members of the Supreme Court bar who are not fully bilingual. Such a change in the composition of the Quebec section of the Supreme Court bar, without any basic alteration in the reception which French-speaking lawyers now experience in that Court, would surely generate a greatly intensified and broadened sense of dissatisfaction.

c) *Proposals for reform*

The concluding part of our questionnaire asked for the lawyers' opinions on both the need for reform and the kind of reform for dealing with the *language* problems associated with Supreme Court practice. Turning first to questions concerning the treatment of language in the *Supreme Court Reports*,<sup>132</sup> as we have already reported above, we found that only a small minority (13 out of 39) of the lawyers felt under any kind of handicap as a consequence of the largely English-speaking nature of the Court's official reports, but that a majority (26 out of 39) favoured the provision of official translations of some or all of the Court's judgments (presumably translations of English judgments into French). This apparent discrepancy becomes more understandable when we bear in mind that the lack of French translations, especially of judgments concerning issues of great importance to Quebec or Canada, affects the entire French-speaking community and not simply those French-speaking lawyers who practise in the Supreme Court of Canada. Many of those who advocated translations might well have been thinking of this larger French-speaking community whose legal system is decisively affected by the Supreme Court's decisions. Thirty-two of the lawyers reported that they had found the new treatment of head-notes helpful, but three-quarters of these lawyers thought that the bilingual head-notes should be extended to more cases. The advocates of both the translation of judgments and the provision of bilingual head-notes generally favoured applying these policies to all of the Court's judgments. Sixteen would have translations for all judgments and 18 favoured bilingual head-notes for all judgments. A smaller group was more discriminating and specified particular areas of law which required more bilingualism in the Court's reports. For both the translation of judgments and bilingual head-notes the suggestions covered two general fields: cases dealing exclusively with matters of Quebec law; and those dealing with issues of importance to all of Canada, especially constitutional law, criminal law, and federal public law. A number of lawyers advocated bilingual head-notes and translation of judgments into French (or English) in both these fields. This dual proposal of bilingual head-notes and French translations for judgments dealing exclusively with Quebec law or with matters of general concern to the whole country represents the minimal expectation of the majority of our sample of French-speaking lawyers.

In our final question we posed the general question of remedies for the language problem: was the language problem serious enough to call for reforms of the Supreme Court itself or its position in the Canadian judicial structure, and if so, what reforms were needed? As we have shown above in Table III.4, just over a majority (22 out of



40) favoured reform. Among the group who advocated reform there was a wide variety of specific proposals, and some lawyers made two or three different suggestions. A considerable number wrote quite lengthy memoranda presenting very thoughtful analyses of the Supreme Court's shortcomings from the point of view of the French-speaking Quebec lawyer.

Rather than advocating the introduction of translation services into the Court's proceedings to compensate for the lack of complete bilingualism on the Court's bench, nearly all the proposals attacked the language problem more directly by recommending changes in the Court's composition or a reorganization of its personnel. Nine lawyers simply insisted that all Supreme Court justices should be fully bilingual. But 10 went further than this, and while they too aimed at insuring that the judges hearing Quebec appeals should be able to follow French-language pleadings, to achieve this they called for a two-chamber division—one chamber for common law and one for civil law. Most of those who made this two-chamber proposal or variations of it stipulated that the Court would require at least five French-speaking jurists to staff its civil-law chamber. Seven of these also explained that they viewed such a reform not so much as a solution to the French-speaking lawyer's language difficulties as a means of providing a knowledgeable panel of at least five judges to review the decisions of Quebec's Court of Queen's Bench in matters pertaining to Quebec's civil law. Two lawyers pushed this point of view a step further and recommended terminating all appeals from the Quebec court of last resort except in matters of federal and constitutional law.

Only a very few lawyers showed any interest in reforms other than those designed to increase the French-speaking civilian talent on the Court's bench. Two recommended the adoption of simultaneous translations of oral argument from French into English; one suggested making bilingualism a requirement for lawyers who wished to practise in the Court, and one suggested the alternation of French and English-speaking Chief Justices.

The interest shown in the establishment of a separate specialized division of the Supreme Court for handling Quebec appeals demonstrates how the classical Quebec protest against the Court—the distrust expressed by Quebec jurists since pre-Confederation days in the competence of a predominantly Anglo-Saxon common-law Supreme Court for reviewing the decisions of Quebec courts dealing with Quebec's distinctive system of civil law—is still the principal source of discontent with the Court. A number of the lawyers in notes appended to their replies explained that they could not separate the question of language from the question of the Supreme Court's effectiveness in adjudicating cases concerning Quebec's civil law. Again no specific cases were cited to illustrate the deleterious effects of the Supreme Court's decisions in this area, although a few lawyers offered a very critical analysis of the background and skills of the judges who sit for Quebec appeals (including the three civilian jurists who are currently members of the Court), comparing them very unfavourably with some of the judges on Quebec's Court of Queen's Bench.

While we certainly cannot ignore the extent to which the language problem in the Court and the problem of providing an appropriate appellate body for Quebec civil law are closely intertwined, still it does not follow that the dual chamber division of the Supreme Court or even the reduction of the Court's jurisdiction in cases involving only Quebec provincial law would provide a complete remedy for the linguistic inadequacies of the Supreme Court. We want to insist here again on a point we have made at many stages in this study. Even if the Court were reconstituted or its jurisdiction reduced so that its English-speaking members were relieved of any responsibility for participating in decisions bearing upon issues confined to Quebec's local law, there would still remain a range of national legal issues for which English and French jurists would have to sit together and which would certainly involve litigation by citizens and counsel from Canada's two major linguistic groups. Evidence of the seriousness of the language problem in this type of case is provided by the lawyers' answers to the question in which we asked if the French-speaking lawyers' difficulties were most severe in some particular kind of case. Fifteen lawyers answered this question in the affirmative and nine of these specified cases involving issues which went beyond purely provincial legal matters; three mentioned criminal laws; two, constitutional law; three, cases heard by more than five judges;<sup>133</sup> and one, cases involving the interpretation of federal statutes. Even with a drastic reconstruction of the Supreme Court along the lines demanded by the Court's civilian critics, cases of this kind raising matters of national importance will continue to be heard by a federal tribunal staffed by English-speaking and French-speaking jurists. A language problem will continue to exist in such a Court so long as either all of its members are not fully bilingual or adequate translation services are not provided in its proceedings.



It is difficult to avoid being overly self-conscious in applying a quantitative analysis to judicial decisions. One finds, particularly in this country, that the expectations of social scientists and lawyers as to the fruitfulness of statistical studies of juridical data tend to cluster around two extremes. Some expect that feeding information about judges and their decisions into a computer and producing tables, graphs and other compilations will for the first time reveal the truth and the light about what judges really do. Others suspect that the whole exercise may be a waste of time and money.

Both kinds of expectation are clearly wrong. I can best explain the general purport of the quantifying studies reported here by pointing out why they are wrong. First, it requires only the barest understanding of the judicial process to appreciate the fact that statistics which, as ours do, refer only to the bare outcome of a decision, ignore the complex process of reasoning which supports judicial decisions. Certainly it would be the height of folly for the practitioner of such a statistical study to purport to explain the significance of a Court's jurisprudence simply by computing the frequency with which its members have cast their votes in a certain direction. Also, it requires only the barest understanding of the logic of induction to realize that the discovery of a co-relation does not prove causation. Where our statistics reveal positive co-relations between the background of judges and their votes on particular issues, no one should be under the illusion that this constitutes a proof that it is the judge's social characteristics which have determined his vote. At most, such co-relations or the lack of them can serve to strengthen or weaken explanatory theories based on careful analysis of the judges' opinions.

While we are willing to acknowledge the limitations of quantitative studies of judicial phenomena (as indeed we should acknowledge the limited value of any single way of studying any phenomenon), we are equally anxious to insist that such studies do have some value. We can only appreciate their value by recognizing the questions to which they are addressed. Some of the questions for which we have sought



statistical answers are the following: What is the nature of the Court's work? How often is it concerned with provincial law or Civil Code cases? Are there significant differences in its disposition of appeals from different sources? Is there any evidence of cultural alliances of judges on different issues? To what extent have common-law judges participated in Quebec appeals dealing with civil law? These are important questions, if for no other reason than the fact that they relate to generalizations which are frequently made without the benefit of any statistical evidence. But further, we are convinced that by acquiring a firmer empirical basis for the answers we are inclined to give to these questions, our understanding of some of the issues examined in Chapter II will be enhanced.

All of our data on the Supreme Court's decisions since 1949 were gathered by means of a questionnaire which was applied to each case.<sup>1</sup> A summary of this questionnaire, showing the aggregate numerical result for each question, is printed in Appendix A. In this chapter we have summarized a few of the results obtained from our various analyses and cross-tabulations of figures taken from these questionnaires. We have excluded the great majority of the tables we developed because they showed no significant tendencies at all or else no patterns related to our central interest in bicultural factors. We should note that the paucity of significant results is in itself significant—often a negative finding is as interesting as a positive one. But it would certainly have been tedious and extravagant to recite all the significant differences and co-relations we failed to find.

The rather small number of bicultural patterns revealed by our quantitative study may suggest that bicultural factors have not been important influences in the Supreme Court's decision-making or, alternatively, that our quantifying techniques are inadequate. Our own predilection is to accept the first explanation. However, we hasten to acknowledge the relatively primitive quality of the quantifying techniques we have employed. With the exception of the bloc-voting analysis derived from the work of Glendon Schubert, the other schemes were developed very quickly and in a completely *ad hoc* manner. More thorough scrutiny of jurimetric methods employed by American scholars, might well have turned up more powerful modes of analysis.<sup>2</sup> It is our earnest hope that rather than persuading Canadian scholars of the futility of quantitative studies of the judicial process, our efforts will provoke them to develop more fruitful and sophisticated techniques.

#### A. *Nature of the Court's Work*

In the absence of official statistics provided by the Court<sup>3</sup> or the profession,<sup>4</sup> we thought that it would be worthwhile reporting some statistics which describe the nature and source of the Supreme Court's work load. This information will give some indication of the way in which the Supreme Court spends its time and the effect which

the rules governing its jurisdiction have had on the character of its docket. An informed approach to reforming the Court's jurisdiction, for whatever ends, would best proceed with the assistance of such information.

In Table IV.1 we have set out some of the basic figures concerning the Supreme Court's case load for the 15-year period since 1949, when the Supreme Court became Canada's ultimate court of appeal. These data concern only the *reported* decisions of the Supreme Court—as do all other data reported in this Chapter. Besides the 1031 reported decisions, 415 unreported judgments are listed for the same 15-year period and it is estimated that there were approximately 600 unreported "motions" during this period.<sup>5</sup>

The omission of unreported judgments and motions introduces a significant bias into the sample of the Supreme Court's decisions considered in this study. While it is difficult to determine precisely the policy pursued by the editors of the official reports in selecting decisions to be reported, at the very least it can be said that the editors try to include all important questions of law settled by the Court or issues having a general application to all of Canada. Further, a review of the reported material<sup>6</sup> indicates that the reported decisions include all reference cases, most criminal appeals and most cases on which the court is divided in opinion. On the other hand, the great majority of the Court's unreported judgments involve cases in which the Court dismissed the appeal. Indeed an examination of the Court's minute book indicates that about one out of every eight appeals brought before the Court is dismissed from the bench without reasons. Also most of the unreported motions are in cases where leave to appeal was refused. All of this suggests that by confining our attention to reported decisions we include in our sample a higher proportion of significant and controversial cases and a higher proportion of cases in which the Supreme Court differs from lower courts, than would be present in the whole population of Supreme Court decisions. This bias must be kept in mind in interpreting the results of the study.

In Table IV.1 the Supreme Court's cases are divided into four basic categories: private law, constitutional law,<sup>7</sup> non-constitutional public law and criminal law. In practice, of course, it is often extremely difficult to apply one, and only one, of these classifications to the subject matter of a case which might involve considerations falling under all four headings.<sup>8</sup> Nevertheless, even allowing for a considerable margin of error in applying this scheme to the complex issues before the Court it does provide a fairly clear indication of the kind of judicial work the Supreme Court does.

The figures at the bottom of the vertical columns "a" to "e" show the total number of reported cases in each area of law handled by the Court from 1950 to 1964. The most significant feature of these figures is that 668 or 65 per cent of the Court's reported decisions were in the area of private law. This means that the Supreme Court spends the greater part of its time settling controversies between private individuals and groups. Most of these private law cases

Table IV.1  
Supreme Court case load, 1950-64

Origin and disposition of case on the merits	Type of law				
	a Private	b Constitu- tional	c Public non- constitu- tional	d Criminal	e Other Total
1. Supreme Court's original jurisdiction	-	-	-	2	3 5
2. Supreme Court reference case	1	3	1	-	2 7
3. Appeal from federal courts*	37	1	57	-	1 96
4. Appeal from federal courts**	28	1	48	-	- 77
5. Appeal from provincial court on leave granted by Supreme Court*	32	4	9	43	- 88
6. Appeal from provincial court on leave granted by Supreme Court**	40	1	4	40	- 85
7. Appeal from provincial court on leave granted by provincial court*	40	3	12	-	- 55
8. Appeal from provincial court on leave granted by provincial court**	35	7	4	-	- 46
9. Appeal as of right from provincial court*	276	8	16	30	- 330
10. Appeal as of right from provincial court**	167	4	10	25	- 206
11. Appeal in <i>forma pauperis</i>	4	-	-	-	2 6
12. Motions	8	1	3	9	9 30
Total	668	33	164	149	17 1031

\*Decision affirmed

\*\*Decision reversed

involved legal matters subject to provincial legislative jurisdiction. Thus it is clear that any attempt to implement the federalist reform of the Supreme Court's jurisdiction and curtail its authority to review provincial court decisions in provincial law matters would drastically reduce the size of the Court's case load.<sup>9</sup> On the other hand, when we look at public law cases, it is apparent that the great bulk of these concern matters which are clearly of federal significance: of the non-private law cases, over 85 per cent involve constitutional law, appeals from the federal courts, and criminal law.<sup>10</sup>

The other facet of the information presented in Table IV.1 which deserves some comment is what it reveals about the determinants of the Court's docket. First, we should note that a little over half of the cases reached the Supreme Court by way of appeals as of right. This in itself shows how limited is the Supreme Court's control over its own docket. We should further note that the provincial courts, exercising the power to grant special leave to appeal under Section 38 of the Supreme Court Act, continue to have considerable influence on the Court's case load.<sup>11</sup> In the 15-year period under consideration here, a little over 10 per cent of the Court's reported decisions were in cases which came to the Court as the result of provincial court decisions to grant leave to appeal.

One other important point emerges when we compare the Supreme Court's disposition of appeals which reach it by way of leave granted by either provincial courts or the Supreme Court with its treatment of appeals which are not judicially screened but simply reach the Court as a matter of right. In the former where either the provincial or Supreme Court granted leave to appeal (5, 6, 7 and 8 in Table IV.1), the Supreme Court confirmed the provincial court decision in 52 per cent of the appeals. However, in appeals as of right there was a significantly greater tendency for the Supreme Court to confirm the provincial court decision. In 330, or 62 per cent of these appeals the decision of the provincial court was upheld by the Supreme Court. The difference between these two ratios of confirmations to reversals is significant at the 5 per cent level.<sup>12</sup> Certainly the most obvious explanation of the difference is that the rules which now give dissatisfied provincial litigants an automatic right of access to the Supreme Court (especially the provision of an appeal as of right in cases involving over \$10,000) bring to the Court an abnormally large number of cases which do not contain highly significant or controversial issues and in which the Supreme Court merely rubber-stamps the decisions of provincial courts.

The Canadian Supreme Court should be contrasted with the highest appellate courts of the United States and Great Britain in terms of both its control over its own docket and the relative weight of nationally important issues in its case load. In both England and the United States the dockets of the highest appellate courts are to a very high degree within the control of the judges. The British House of Lords hears a relatively small number of cases and this is mainly explained by the fact that an appeal can be taken to that court only by leave of the court below or of the House of Lords itself. In the



United States a series of statutes culminating in the Judiciary Act of 1925<sup>13</sup> greatly reduced appeals as of right and gave the Supreme Court a very large measure of control over its own docket. As a recent judicial study of these features of appellate courts has noted, the objective of this development "was to allow it [i.e. the Supreme Court] to concentrate its energies on crucial questions of nationwide concern."<sup>14</sup>

The contrasting situation in Canada means that the Supreme Court spends a great deal of time hearing cases which hardly merit adjudication by the nation's highest judicial tribunal. The amount of time it spends on what might be called non-meritorious appeals, coupled with its generosity in allowing time for oral arguments and its lack of professional research assistance by law clerks, seriously reduces the amount of attention which the Supreme Court can give to those legal issues which are of greatest significance to the country. It might also be argued, if one hankers for a more activist, statesman-like Court, that the constant adjudication of rather mundane and insignificant disputes between private citizens is not likely to produce the habits of mind and judicial techniques required of judges who are expected to play a creative role in adjusting the country's legal fabric to the changing needs of a complete society.

#### *B. Disposition of Provincial Appeals*

Of the Supreme Court's relationships with other institutions, certainly the most critical is its interaction with the provincial courts. As Canada's general appeal court, by far the largest part of its work is concerned with reviewing the decisions of provincial courts of last resort. In the 15-year period from 1949 to 1964, just under 80 per cent of its reported decisions were in provincial appeals. Thus it seemed worthwhile to breakdown its appellate record on a provincial basis in order to discover whether there was a significant variation in the Supreme Court's relationships to the various provincial court systems and, in particular, if there was anything distinctive about the Supreme Court's relationship to the Quebec courts.

Two points of interest emerge from our analysis. The first of these concerns the frequency with which the provincial courts grant leave to appeal to the Supreme Court. Here our figures indicate that the court of highest resort in Quebec granted leave to appeal its decision proportionately far less often than did its counterparts in the other provinces. The relevant data are set out in Table IV.2 where, for the Supreme Court's provincial appeals from 1950 to 1964, we have cross-tabulated the origin (in terms of how the case came to the Court) and disposition (that is, whether the Supreme Court affirmed or reversed the lower court's decision) of provincial appeals with the provinces from which the appeals were taken. This table shows, for instance, that whereas the Ontario courts granted leave to appeal their decisions to the Supreme Court in 33 cases, Quebec

Table IV.2  
Origin and disposition of provincial appeals by Supreme Court, 1950-64

Origin and disposition of case on the merits	Province appealed from									
	Nfld.	P.E.I.	N.S.	N.B.	Que.	Ont.	Man.	Sask.	Alta.	B.C. Total
1. Appeal from provincial court on leave granted by Supreme Court*	1		1	2	24	35	5	3	4	12 87
2. Appeal from provincial court on leave granted by Supreme Court**			1	3	24	25	4	5	2	21 85
3. Appeal from provincial court on leave granted by provincial court*	2		1	4	4	20	1	6	5	12 55
4. Appeal from provincial court on leave granted by provincial court**				4	6	13	5	3	4	11 46
5. Appeal as of right from provincial court*	1		6	10	120	91	13	17	32	40 330
6. Appeal as of right from provincial court**	1	2	6	5	61	54	9	15	24	28 205
7. Appeal in <i>forma pauperis</i>						3	1			4
Total	3	4	15	28	239	241	38	49	71	124 812

\* Decision affirmed.

\*\* Decision reversed.

courts granted leave in only 10 cases. Over all, appeals granted by leave of the provincial court accounted for 12 per cent of all appeals from the other provinces, whereas such appeals accounted for only 4 per cent of Quebec's total. This difference is significant at the level of one-tenth of 1 per cent.

This difference might be explained by the relative lack of interest on the part of Quebec litigants in applying to the provincial court for leave to appeal. But the figures for appeals as of right—181 from Quebec as compared, for instance, with 145 from Ontario—and for appeals on leave granted by the Supreme Court—48 for Quebec as compared with 60 for Ontario—do not suggest that Quebec litigants are less zealous than those of other provinces in pressing their claims for access to the Supreme Court. It would seem that the more plausible explanation is the reluctance of Quebec judges to have their decisions reviewed by the Supreme Court. Such an explanation becomes understandable when we bear in mind the classical Quebec view, shared by many of that province's jurists, that the Supreme Court compared to Quebec's highest court is relatively unqualified for handling civil-law issues, and again when we examine some of the special areas in which the Supreme Court is most apt to be at odds with the Quebec courts.

The second point of interest emerges from our comparison of the Supreme Court's treatment of Quebec appeals with its treatment of appeals from the other provinces. Here we find that over the whole spectrum of cases there is very little quantitative difference between the Supreme Court's treatment of Quebec appeals and its disposition of those from the other provinces. Quebec courts were reversed in 38 per cent of Quebec appeals. This, with the exception of Newfoundland which only had three appeals during this period, was the lowest reversal ratio of any of the provinces, although the difference between Quebec's ratio and that of the other provinces is not statistically significant.

Table IV.3 shows the ratio of appeals in which the provincial court of highest resort was reversed to total provincial appeals for each province. It gives the frequencies of reversals for all cases, as well as separate frequencies for each of the major legal categories—private, criminal, non-constitutional public, and constitutional—and for the smaller number of "civil liberty" and "bicultural issue" cases. In the first three of the major legal categories, where the number of cases is large enough to make statistical comparisons possible, no significant differences appear. In the field of private law containing most of Quebec's Civil Code appeals, where some might expect the Supreme Court to be especially respectful of Quebec appeal court decisions, it is true that after Newfoundland Quebec has the lowest reversal ratio, but still it is only 3 percentage points lower than Ontario's. The real contrast is between Ontario and Quebec together and the other provinces. The lower reversal ratios of the latter two might reflect a relatively higher degree of sophistication in the treatment of "lawyer's law" by the bar and bench of these provinces.

Table IV.3  
Frequency of Supreme Court reversals of provincial courts in provincial appeals 1950-64

Province	All cases	Civil liberty cases	Other bicultural issue cases	Criminal law	Constitutional law	Non-constitutional public law	Private law
1. Que.	$\frac{91}{239}(.38)$	$\frac{9}{15}(.60)$	$\frac{9}{12}(.75)$	$\frac{18}{31}(.58)$	$\frac{4}{5}(.80)$	$\frac{2}{9}(.22)$	$\frac{65}{195}(.35)$
2. Nfld.	$\frac{1}{3}(.33)$	0	0	0	0	0	$\frac{1}{3}(.33)$
3. P.E.I.	$\frac{2}{4}(.50)$	0	0	$\frac{0}{1}(.00)$	$\frac{1}{1}(1.00)$	0	$\frac{1}{2}(.50)$
4. N.S.	$\frac{7}{15}(.47)$	$\frac{0}{1}(.00)$	$\frac{0}{1}(.00)$	$\frac{1}{2}(.50)$	$\frac{0}{1}(.00)$	0	$\frac{6}{12}(.50)$
5. N.B.	$\frac{12}{28}(.43)$	$\frac{1}{3}(.33)$	$\frac{0}{2}(.00)$	$\frac{1}{3}(.33)$	$\frac{2}{3}(.67)$	$\frac{1}{4}(.25)$	$\frac{11}{19}(.58)$
6. Ont.	$\frac{92}{238}(.39)$	$\frac{8}{22}(.36)$	$\frac{5}{13}(.46)$	$\frac{19}{45}(.42)$	$\frac{2}{8}(.25)$	$\frac{9}{24}(.38)$	$\frac{63}{167}(.38)$
7. Man.	$\frac{18}{37}(.49)$	$\frac{3}{4}(.75)$	$\frac{2}{2}(1.00)$	$\frac{6}{11}(.55)$	$\frac{2}{6}(.33)$	$\frac{1}{1}(1.00)$	$\frac{9}{18}(.50)$
8. Sask.	$\frac{23}{49}(.47)$	$\frac{0}{1}(.50)$	0	$\frac{2}{2}(1.00)$	$\frac{3}{6}(.50)$	$\frac{2}{4}(.50)$	$\frac{18}{40}(.45)$
9. Alta.	$\frac{30}{71}(.42)$	$\frac{0}{2}(.00)$	0	$\frac{3}{15}(.20)$	$\frac{1}{3}(.33)$	$\frac{1}{2}(.50)$	$\frac{25}{51}(.49)$
10. B.C.	$\frac{60}{124}(.48)$	$\frac{6}{15}(.40)$	$\frac{4}{7}(.57)$	$\frac{14}{27}(.52)$	$\frac{2}{8}(.25)$	$\frac{2}{10}(.20)$	$\frac{43}{83}(.52)$
11. Rows 2-10	$\frac{245}{569}(.43)$	$\frac{18}{48}(.38)$	$\frac{11}{25}(.44)$	$\frac{46}{106}(.43)$	$\frac{13}{36}(.38)$	$\frac{16}{45}(.36)$	$\frac{176}{395}(.45)$



In the small cluster of cases which we have designated as ones involving civil liberties or bicultural issues,<sup>15</sup> the reversal ratios for Quebec are high (.60 and .75 respectively), but the numbers are too small to support significant intra-provincial comparisons. Nevertheless, what these figures do show is that the small group of cases in which the Quebec court of last resort was most dramatically and controversially reversed by the Supreme Court of Canada stands out in marked contrast to the general pattern of Quebec appeals in which the frequency of reversals is normally low.

When we look at the 10 cases involved in these civil liberties and bicultural issue categories, we find that they include what were probably the most controversial Quebec appeals coming to the Supreme Court since the abolition of Privy Council appeals. Half of them were generated by conflicts between Quebec authorities and the vigorously anti-Catholic Jehovah's Witness sect. These five cases—*Boucher v. The King* [1951] S.C.R. 265; *Saumur v. City of Quebec* [1953] 2 S.C.R. 299; *Chaput v. Romain et al* [1955] S.C.R. 834; *Roncarelli v. Duplessis* [1959] S.C.R. 121; and *Lamb v. Benoit* [1959] S.C.R. 321—with the exception of the *Chaput* case, were also cases in which the French Canadian judges on the Supreme Court were all on the dissenting side. Four of the other five cases also involved highly controversial issues. Two of these were in the area of constitutional law. *Henry Birks & Sons (Montreal) Ltd. and others v. City of Montreal and A.-G. Que.* [1955] S.C.R. 799 concerned the validity of Quebec legislation enabling municipalities to pass by-laws to close stores on religious holidays; *Switzman v. Elbling and A.-G. Que.* [1957] S.C.R. 285 concerned the validity of Quebec's so-called "Padlock Law." While the Supreme Court was unanimous in the *Birks* case, in the Padlock-Law case, Justice Taschereau dissented alone. In two further cases, however, *Brodie, Dansky and Rubin v. The Queen* [1962] S.C.R. 681, which raised the question of whether *Lady Chatterley's Lover* was an obscene publication, and *Taillon v. Donaldson* [1953] 2 S.C.R. 257, which concerned the rights of natural parents over their children, the French Canadian judges again dissented together. The tenth case, *A.-G. Canada v. Reader's Digest Association* [1961] S.C.R. 775, although it involved an important question of constitutional jurisprudence concerning the admissibility of extrinsic evidence, in terms of the clash of social values was the least controversial of the 10 and in it the Supreme Court was unanimous.

Thus what we find in these cases is a marked overlap of those controversial cases in which the Supreme Court has reversed the Quebec court of last resort with those in which the Court's French Canadian judges have been outvoted by their English Canadian colleagues. Further statistical evidence of this trend is provided in the next section of this Chapter where we report the results of our analysis of the voting patterns of the Supreme Court judges. To many, of course, this statistical evidence may seem only to confirm the obvious. But often that is all empirical research can do, if speculative generalizations have been well-founded. Perhaps one point that our quantitative analysis does bring out which was not generally "known"

before, is the degree to which the clash of judicial attitudes in these controversial Quebec appeals represents an exception to the pattern which has generally prevailed in Quebec appeals.

We cannot, of course, treat the quantitative evidence of a French-English split in these civil liberties and bicultural issue cases as constituting a proof that in these cases it is the ethnic background of the judges which is the main determinant of the clash of judicial attitudes. At best, we take such evidence as being consistent with such a view. But no amount of quantifying is likely to be thorough enough to isolate all the variables which may enter into the determination of a law-suit. Whatever inferences might be drawn from the statistical evidence presented here will be more carefully investigated in our more "qualitative" study of the leading cases discussed in the next chapter. Also we should bear in mind the point which we raised in Chapter II<sup>16</sup> in our discussion of bicultural concerns—even if, over a given category of legal issues, there is a marked tendency for Quebec or French Canadian judges to be pitted against English Canadian judges, this division of judicial attitudes need not necessarily be taken to be co-terminous with the division of popular attitudes between the two major cultural groups. Indeed, it may be that the important common social characteristic of those French-speaking Quebec jurists who are defeated by the Supreme Court majority is not merely the fact that they are French Canadian or from Quebec but that they are from that segment of the Quebec legal profession which is most likely to receive judicial appointments controlled by the Quebec section of the federal cabinet.

The "civil liberties" appeals from Manitoba help put the Quebec experience in some perspective. Here too there was a high ratio of reversals to appeals: in three out of four cases the Supreme Court, taking what might be termed the "liberal" side of the case, reversed decisions of the Manitoba appeal court. All three cases were reported in 1964 and in all three the Supreme Court was unanimous. In *Prince and Myron v. The Queen* [1964] S.C.R. 81 the Court held that Indians hunting for their livelihood on unoccupied Crown land or land to which they had a right of access were not subject to the restrictions imposed on sportsmen by Manitoba's *Game and Fisheries Act*; in *Dominion News & Gifts (1962) Ltd. v. The Queen* [1964] S.C.R. 251, with Chief Justice Taschereau writing the opinion of the Court, the Supreme Court found that issues of *Escapade* and *Dude* magazines were not obscene; and in *Winnipeg Film Society v. Webster* [1964] S.C.R. 280, the Court ruled that Section 6 (1) of the *Lord's Day Act* did not prevent the Film Society from showing films on Sundays. In the one civil liberties case in which the Supreme Court dismissed the Manitoba appeal, *Orchard et al v. Tunney* [1957] S.C.R. 436, the Court again upheld the right of the individual, this time against a trade union accused of improperly suspending his union membership. Thus the Manitoba cases in this area, revealing as they do a conflict between what might be called a more "liberal" Supreme Court and a less "liberal" provincial court, should be kept in mind in interpreting the high frequency of Supreme Court reversals of Quebec appeal court

decisions in civil liberties cases. The Manitoba cases should at least make one cautious about giving ethnic explanations of the Quebec cases.

The one other phase of provincial appeals which calls for some comment is the record of Quebec's constitutional appeals to the Supreme Court. The number of Quebec appeals raising questions of constitutional law<sup>17</sup> was so small that it would be rash to infer very much from the unusually high reversal ratio (four out of five) that Quebec decisions have experienced in this area. It should be noted that three of our four Quebec reversals were the (1953) *Saumur* case, the *Birks* and the *Padlock-Law* cases, all of which involved important civil liberties values. The fourth was *Vic Restaurant Inc. v. City of Montreal* [1959] S.C.R. 58, which, while it found all three of the Quebec Supreme Court judges in dissent, did not raise an issue which fell into the same nexus as the *Saumur*, *Birks* and *Switzman* cases. The one constitutional case in which the Supreme Court denied the Quebec appeal was the most recent effort of the Jehovah's Witnesses to force the Supreme Court to decide the validity of Quebec legislation restricting that sect's freedom of communication. But in this case, *Saumur et al. v. Procureur Général de Québec et al.* [1964] S.C.R. 252, while the Supreme Court upheld the judgment of the Quebec Court of Queen's Bench, it did so not on the merits but on the procedural point of whether or not it was appropriate to hear an appeal on the merits. But what is perhaps most significant here is simply the small number and special character of Quebec constitutional cases. During this 15-year period there were 45 cases in which the constitutionality of legislation was questioned. Forty-one of these came to the Supreme Court by way of provincial appeals and four in federally-initiated reference cases. Thirty-four of the 41 provincial appeal cases which raised constitutional questions presented challenges to the validity of provincial legislation. But outside of Quebec most of these constitutional cases involved tests of the validity of provincial initiatives in the field of taxation,<sup>18</sup> commercial and economic regulation<sup>19</sup> and transportation (including highways) policy.<sup>20</sup> It is also worth noting that ten of these cases were initiated by provincial governments referring constitutional questions to the courts. Quebec's record of constitutional litigation during these years is quite outside this general pattern. Not only were constitutional challenges rather few in number—five as compared with eight each in Ontario and British Columbia and six each in Manitoba and Saskatchewan—but, with one exception, they were essentially concerned with provincial restrictions of vital communicative freedoms, and certainly none of these was initiated by the Quebec government's reference of the constitutional question to the courts.

In the area of constitutional law Quebec appeal cases to the Supreme Court suggest a relative lack of interest on the part of private individuals and groups in Quebec in pressing challenges to new provincial legislative programmes to the nation's highest tribunal, as well as the lack of any inclination on the part of the Quebec provincial government voluntarily to turn to the Supreme Court for the



resolution of constitutional controversies. Of the four constitutional appeals which did go before the Supreme Court to be decided on the merits, not only did three of them focus on the province's capacity to limit religious and communicative freedoms, but in all three, the Quebec Court of Queen's Bench was reversed and the provincial legislation was found to be either inoperative<sup>21</sup> or invalid.<sup>22</sup>

The record of the Supreme Court's treatment of constitutional challenges to provincial legislation further suggests that it has been more inclined to cut down Quebec legislation which might be regarded as curtailing civil liberties than to invalidate the more prosaic legislative ventures of the other provinces in such fields as business regulation, taxation, and highways control. In only 11 of the 29 challenges to provincial legislation from provinces other than Quebec did the Supreme Court find provincial legislation invalid in whole or in part. We should bear in mind again, with regard to this contrast, that the small number of Quebec cases may make any generalizations based on this quantitative evidence hazardous. Still, the relative paucity of Quebec constitutional appeals to the Supreme Court may, in itself, be indicative of rather different attitudes in that province to the merits of challenging provincial legislation up to the Supreme Court level.

### *C. Voting Patterns*

Our purpose in this part of our quantitative analysis of Supreme Court decisions is to see if it is possible to identify any provincial or ethnic blocs at work in the Supreme Court's decision-making. By blocs we simply mean a group of judges who display an abnormally high tendency to vote together in certain categories of decisions which tend to divide the Court. Where we can show that a group of judges with a common ethnic or provincial background tend to function as a bloc in some area of law which is thought to be vulnerable to a division of opinion along ethnic or provincial lines, we add further support for the hypothesis that the ethnic or provincial background of judges is a determinant of their decision-making in certain types of cases.

The factors which might function as determinants of judicial decision-making are innumerable. Any of these factors, ranging from the differing legal philosophies and techniques of the judges to differences in their social and psychological characteristics, might be capable of consistently dividing the members of the Court, in certain areas of their work, into blocs. However, because of the terms of reference of this study, we have concentrated solely on common elements in the provincial and ethnic backgrounds of the judges as possible determinants of blocs.

Besides providing evidence for the existence of ethnic or provincial blocs, the quantitative study is also designed to cast some light on the power structure of the Court. We are interested not only in identifying the common denominators of the divisions of the



Court's bench but the relative power which different groups of judges have in determining controversial issues which come before the Court. Again this investigation of the distribution of power focuses on those cases which seem most sensitive to bicultural and federal concerns.

The method employed on this study of the voting behaviour of Supreme Court justices was derived from techniques developed by Professor Glendon A. Schubert.<sup>23</sup> The tables used by Schubert in his approach to bloc-analysis are designed to exhibit three different kinds of judicial coalescence. First, there is a table which is aimed at identifying dissenting blocs and records for every possible pair of judges the number of times they dissent together. Secondly, a table can be constructed which shows the participation of judges in the majority in the Court's split decisions by recording the number of times each pair of justices votes together in assent in split decisions. A third type of table, constructed out of the data used for the first two tables, displays the over-all pattern of interagreement on the Court in split decisions. This table shows paired agreement of the judges in both assent and dissent, expressed as a percentage of total paired participation for each pair of judges.

Schubert in interpreting the data shown in these tables has evolved certain indices for testing whether the frequency with which the members of a postulated bloc are paired together is significantly high so that the members of the postulated bloc can in fact be considered to belong to a bloc. These indices which we will refer to below in interpreting our own results are taken as measures of significance simply "on the basis of limited empirical application."<sup>24</sup> While we have not been able to develop any alternative measures of significance, still we should be cautious about applying Schubert's indices (which were developed in the context of the United States Supreme Court's decisions) to Canadian Supreme Court decisions.

In particular we must bear in mind that unlike the United States Supreme Court whose entire membership sits for each case, the Canadian Supreme Court rarely sits *en banc*. For the Canadian Supreme Court, five judges constitute a quorum, and for the bulk of its cases, only five judges sit.<sup>25</sup> This means that in comparing the frequency with which particular pairs or groups of judges coalesce together, consideration must be given to the frequency with which the members of the group or bloc are present together for the cases under consideration.

Also, given the rather prosaic character of the Supreme Court of Canada's case load, the number of cases raising large public issues entailing sharp and significant value conflicts is comparatively small. In order to produce larger numbers of cases for bloc-analysis, we developed single tables for the entire period from 1954 to 1964, even though there were a number of changes in the Court's personnel during this period. We accomplished this by bracketing together each member of the 1954 Court with the judge who replaced him. If the replacement was in turn subsequently replaced, as was the case with Justice Nolan who replaced Justice Estey and later was replaced

by Justice Martland, we bracketed all three judges together. While this procedure conceals differences between the original judge and his replacement it does not affect the principal target of our analysis—the voting behaviour of French-speaking Quebec justices as compared with that of English-speaking judges. In 1954 Justice Abbott replaced Chief Justice Rinfret and after that there were no further changes in the Quebec representation on the Court. This means that for the entire decade from 1954 to 1964 we are dealing with the same trio of Quebec judges. Thus our voting data is divided into two periods—the first is the period during which Chief Justice Rinfret, Justices Taschereau and Fauteux were the three Quebec judges; and the second that during which Justices Abbott, Taschereau and Fauteux were the Quebec judges. By organizing our data in this way, not only do we obtain larger numbers of cases for each table, but in so doing we are still able to observe the extent to which the Quebec judges voted together. And, further, we may gain an over-all comparison of the degree of coalescence among the Quebec judges when all of them were French-speaking (i.e. the "Rinfret" Court) with that which obtained when one was English-speaking (i.e. the "Abbott" Courts).

The technique employed here focuses on a court's split decisions. This feature of our method must be borne in mind, for it means that we set aside the 70 per cent of the Supreme Court's decisions in which all of its members sitting for a case were in agreement with one another. Thus our analysis of the Court's divisions must be set in the context of this larger pattern of agreement among all of the Court's members.

### *1. Over-all voting patterns*

Before examining the voting behaviour of Supreme Court judges in certain specialized legal categories we shall look at an aggregate picture of the Court's division in all areas of law. Tables IV.4 and IV.5 record the ratios of paired agreement for each pair of judges in the "Rinfret" and "Abbott" periods. For each pair of judges the ratio is formed by dividing the number of times the two judges were present for a case into the sum of their joint assents and dissents. This type of interagreement table should draw our attention to any pair or group of judges between whom there is an unusual degree of agreement or disagreement. Because the denominator of these ratios is the paired participation of the judges, these ratios of inter-agreement take into account the extent to which judges are not involved in the same cases—a factor which is particularly important for the Canadian Supreme Court which usually sits as a five-judge court.

As we might expect we find very little evidence of consistent judicial alliances running through all of the Court's split decisions. It is only in a series of cases revolving around a particular issue that we might expect to find well-defined blocs; still there are several aspects of these over-all voting patterns which are worth commenting upon.

Table IV.4

Ratios of interagreement in split decisions of the "Rinfret" Court, 1950-4

Judges	Rand	Kellock	Estey	Locke	Cartwright	Kerwin	Rinfret	Fauteux	Taschereau
Rand		81	62	52	66	48	42	45	39
Kellock	81		76	64	48	58	42	63	50
Estey	62	76		45	49	71	50	58	46
Locke	52	64	45		33	33	46	35	43
Cartwright	66	48	49	33		50	38	61	54
Kerwin	48	58	71	33	50		56	62	56
Rinfret	42	42	50	46	38	56		53	53
Fauteux	45	63	58	35	61	62	53		81
Taschereau	39	50	46	43	54	56	53	81	

97 cases

The most distinctive pattern of coalescence is that manifested by Justices Taschereau and Fauteux. These two French-Canadian judges who served on the Court's bench throughout our entire 15-year period displayed an extraordinarily high rate of agreement with each other—over 80 per cent in both the "Rinfret" and "Abbott" periods. This is considerably higher than the 70 per cent which Schubert postulates as a significantly high ratio of interagreement.<sup>26</sup> However, neither of the other two Quebec judges, Chief Justice Rinfret or Justice Abbott, showed the same degree of cohesion with his provincial colleagues. Perhaps Chief Justice Rinfret's rather even pattern of agreement reflects the way in which the Chief Justice's office conditions its incumbent to play a more moderate and conciliatory role on the Court.

In each table we have tried to establish that sequence of judges best designed to reveal blocs of judges.<sup>27</sup> For the first period, Table IV.4 points to two possible blocs. Justices Rand, Estey and Kellock, three English-speaking judges normally considered rather liberal in their basic outlook, have an Index of Interagreement (the average of their ratios of interagreement) of .73, which is quite high. But as these three judges came from New Brunswick, Saskatchewan and Ontario respectively, they could not be described as either a provincial or even a regional bloc. Moreover, when we note that the other three non-Quebec judges, Justices Locke, Cartwright and Kerwin, agreed with their French-speaking colleagues in about the

Table IV.5

Ratios of interagreement in split decisions of the "Abbott" Courts, 1954-64

Judges	Cartwright	Locke-Hall	Rand-Ritchie	Kerwin-Spence	Estey-Nolan-Martland	Kellock-Judson	Abbott	Fauteux	Taschereau
Cartwright		47	53	37	47	29	28	30	27
Locke-Hall	47		45	51	54	40	34	49	48
Rand-Ritchie	53	45		51	73	68	49	53	52
Kerwin-Spence	37	51	51		61	64	72	60	59
Estey-Nolan-Martland	47	54	73	61		57	69	63	54
Kellock-Judson	29	40	68	64	57		77	67	58
Abbott	28	34	49	72	69	77		70	71
Fauteux	30	49	53	60	63	67	70		83
Taschereau	27	48	52	59	54	58	71	83	

213 cases

same proportion of cases as with the other English-speaking judges, we should become very wary of referring to the Rand-Kellock-Estey trio as an ethnic bloc. In the opposite corner of Table IV.4 the three Quebec judges are grouped. But when we add Chief Justice Rinfret's ratios of agreement with his fellow Quebecers to Justice Fauteux's and Justice Taschereau's, we arrive at the rather moderate Index of Interagreement of .62. Again this hardly seems high enough to justify our attributing to this group the characteristics of an ethnic or provincial bloc. This view seems to be all the more



justified when we observe, for instance, that Fauteux's average ratio of agreement with Kellock, Cartwright and Kerwin was also .62.

In the second part of the post-1949 period, however, with Abbott taking Rinfret's place on the Supreme Court bench, the three Quebec judges formed a more cohesive bloc. Their Index of Interagreement was .75. However, the significance of this diminishes somewhat when we observe the generally high ratios of agreement which obtained between all the Court's judges during this period, with the exception of Justice Cartwright and the Locke-Hall combination. When we average the ratios of agreement for all the pairs of judges exclusive of those involving either Justice Cartwright or Justices Locke and Hall, we find that the Index of Interagreement for the seven judges in this grouping is .63.

What shows up in Table IV.5 far more sharply than the contours of any blocs is the relative isolation experienced by Justices Cartwright and Locke during these years. This is particularly marked in the case of Justice Cartwright whose average frequency of concurrence with his colleagues in split decisions was .37. There can be no doubt that Justice Cartwright has been the Supreme Court's great dissenter. His 118 dissenting votes represent over 22 per cent of all recorded dissents during the 15-year period. Only Justice Locke was close to this record with 79 dissenting judgments. But after Locke no other judge has come close to Justice Cartwright's record: the other two judges who served for the entire 15-year period—the two French-Canadian justices, Taschereau and Fauteux—dissented in only 48 and 36 decisions respectively.

Summing up the results of these two tables we can say that the voting patterns through the whole variety of the Court's work over the past 15 years do not point to a division of the Court along essentially bicultural lines. It is true that the two French-speaking judges who were members of the Court throughout the entire period have agreed with each other more frequently than they have agreed with any other judges. But, on the other hand, the figures do not point to a consistent division of the Court along ethnic or provincial lines. Aside from the Rand-Kellock-Estey alliance on the "Rinfret" Court and the isolation of Justices Cartwright and Locke throughout the "Abbott" Courts, the non-Quebec judges would appear to have had about as much in common with the Quebec judges as with each other. We have not bothered to show paired dissent or assent in all of the Court's split decisions, but we can report that our inspection of these tables did not reveal any more substantial trends than the Interagreement Tables. We must now go on to examine voting in more specialized legal fields where there is a greater likelihood of encountering more sharply defined blocs based on real relationships among the judges.

## *2. Judicial blocs in civil liberties and bicultural issue cases*

Judicial blocs were most evident in those split decisions concerning what we identified as questions of civil liberties or bicultural issues. Bloc-analysis here provided some confirmation of the widely

held theory that in these cases divisions of the Supreme Court usually found a liberal, common-law majority on one side of the Court and a dissenting Quebec minority on the other.

Looking first at the "Rinfret" Court (1950-4), Tables IV.6 to IV.11 chart the justices' voting record in split decisions on civil liberties and other bicultural issue cases. Admittedly we are dealing with a small number of cases in these tables. Nevertheless a fairly clear pattern of dissent is revealed as well as some indication of a dominant majority bloc.

Table IV.6 records for each pair of judges the number of times they dissented together in cases concerning civil liberties. The bracketed figures on the diagonal indicate the total number of times each judge dissented. In Table IV.7 we have simply added to Table IV.6 the voting record in the three split decisions which concerned bicultural issues other than civil liberties questions. These tables confirm that in this cluster of controversial cases, the three Quebec judges, with Cartwright as a close ally formed a dissenting bloc during this period.<sup>28</sup>

Tables IV.8 and IV.9 record the number of times each pair of judges agreed with one another in assent. When we look at these tables there does not appear to be as clear an indication of a dominant majority bloc as there was of a dissenting bloc.<sup>29</sup> Although one aspect of the Court's power structure which these tables do demonstrate is the relatively little influence which the three Quebec judges have had in determining the outcome of these cases.

In Tables IV.10 and IV.11, the data concerning paired assent and paired dissent from the previous tables are combined in the form of ratios showing for each pair of judges their joint participation in the decisions under consideration divided into the sum of their joint assents and dissents. These tables confirm the functioning in civil liberties and bicultural issue cases of two main alliances: a winning coalition of four English-speaking judges—Justices Rand, Kerwin, Kellock and Estey; and the losing trio of French-speaking justices. The members of the latter group never disagreed with one another. The majority group demonstrated a high degree of cohesion in the civil liberties cases with an Index of Interagreement of .89; in civil liberties plus other bicultural issues their average ratio of agreement was a slightly lower .78.

Although we shall be analyzing some of the cases involved in these tables in considerable detail in the next chapter with a view to examining the kind of value conflict which is involved in these divisions, it might also be worthwhile here to sketch in the character of the cases upon which these tables are based in order to obtain some idea of the issues around which these blocs of Supreme Court judges seem to form. Looking first at the civil liberties cases, two of these were very prominent controversies involving the Jehovah's Witnesses—*Boucher v. The King* [1951] S.C.R. 265, and *Saumur v. City of Quebec* [1953] 2 S.C.R. 299. In both of these cases, the three Quebec judges were joined in dissent by Cartwright. The other dissents by the Quebec judges came in two cases: the first of these,

Table IV.6

Paired agreement in dissent in civil liberties cases, "Rinfret" Court, 1950-4

Judges	Kerwin	Estey	Rand	Kellock	Locke	Cartwright	Rinfret	Fauteux	Taschereau
Kerwin	-	-	-	-	-	-	-	-	-
Estey	-	(1)*	-	-	-	-	-	-	-
Rand	-	-	-	-	-	-	-	-	-
Kellock	-	-	-	(1)	-	-	-	1	1
Locke	-	-	-	-	(2)	-	1	-	-
Cartwright	-	-	-	-	-	(4)	2	2	2
Rinfret	-	-	-	-	1	2	(3)	2	2
Fauteux	-	-	-	1	-	2	2	(3)	3
Taschereau	-	-	-	1	-	2	2	3	(3)
8 cases									

Table IV.7

Paired agreement in dissent in civil liberties and bicultural issue cases, "Rinfret" Court, 1950-4

Judges	Kerwin	Estey	Rand	Kellock	Locke	Cartwright	Rinfret	Fauteux	Taschereau
Kerwin	(1)	-	-	-	-	1	1	-	-
Estey	-	(1)	-	-	-	-	-	-	-
Rand	-	-	(1)	-	-	-	-	-	-
Kellock	-	-	-	(1)	-	-	-	1	1
Locke	-	-	-	-	(2)	-	1	-	-
Cartwright	1	-	-	-	-	(5)	3	2	2
Rinfret	1	-	-	-	1	3	(4)	2	2
Fauteux	-	-	-	1	-	2	2	(4)	4
Taschereau	-	-	-	1	-	2	2	4	(4)
11 cases									

\* Bracketed figures on the diagonal in this and the following tables indicate the number of times each judge dissented or assented as the case may be.

Table IV.8

Paired agreement in assent in split decisions in civil liberties cases, "Rinfret" Court, 1950-4

Judges	Cartwright	Locke	Rand	Kerwin	Kellock	Estey	Taschereau	Fauteux	Rinfret
Cartwright (3)	2	2	3	1	2	-	-	-	-
Locke	2	(5)	3	4	2	4	-	1	1
Rand	2	3	(5)	5	4	4	1	1	-
Kerwin	3	4	5	(7)	5	6	2	1	-
Kellock	1	2	4	5	(5)	5	2	1	-
Estey	2	4	4	6	5	(7)	2	2	1
Taschereau	-	-	1	2	2	2	(2)	1	-
Fauteux	-	1	1	1	1	2	1	(2)	1
Rinfret	-	1	-	-	-	1	-	1	(1)

8 cases

Table IV.9

Paired agreement in assent in split decisions in civil liberties and bicultural issue cases, "Rinfret" Court, 1950-4

Judges	Cartwright	Locke	Rand	Kerwin	Kellock	Estey	Taschereau	Fauteux	Rinfret
Cartwright (4)	2	2	3	2	3	-	-	-	-
Locke	2	(7)	4	5	4	6	-	1	1
Rand	2	4	(6)	5	5	5	1	1	-
Kerwin	3	5	5	(8)	6	7	2	1	-
Kellock	2	4	5	6	(8)	8	2	1	-
Estey	3	6	5	7	8	(10)	2	2	1
Taschereau	-	-	1	2	2	2	(2)	1	-
Fauteux	-	1	1	1	1	2	1	(2)	1
Rinfret	-	1	-	-	-	1	-	1	(1)

11 cases



Table IV.10

Ratios of interagreement in split decisions in civil liberties cases,  
"Rinfret" Court, 1950-4

Judges	Cartwright	Locke	Rand	Kerwin	Kellock	Estey	Taschereau	Fauteux	Rinfret
Cartwright		33	50	50	20	28	50	50	50
Locke	33		60	67	40	57	0	20	50
Rand	50	60		100	100	80	33	33	0
Kerwin	50	67	100		83	86	40	25	0
Kellock	20	40	100	83		83	60	50	0
Estey	28	57	80	86	83		40	40	25
Taschereau	50	0	33	40	60	40		100	100
Fauteux	50	20	33	25	50	40	100		100
Rinfret	50	50	0	0	0	25	100	100	

Table IV.11

Ratios of interagreement in split decisions in civil liberties and bicultural issue cases, "Rinfret" Court, 1950-4

[illegible]

*McKee v. McKee* [1950] S.C.R. 700, concerned the custody of a child and here Justices Taschereau and Fauteux, led in their dissent by Justice Kellock, attached a higher priority to the apparent moral superiority of the father as a parent than to the circumstance that the father had jumped from California to Ontario in order to escape the ruling of the American court to whose jurisdiction he had first submitted; in the second, *Williams et al. v. Aristocratic Restaurants* [1951] S.C.R. 762, Chief Justice Rinfret, supported by Justice Locke, disagreed with the majority finding that sidewalk picketing in front of an employer's restaurant was a permissible exercise of free speech.

It is interesting to observe that in both the *Boucher* and *Saumur* cases Justice Cartwright sided with his three Quebec colleagues in their dissenting defence of state actions to curb the proselytizing activities of the Jehovah's Witnesses, whereas in his other two dissents, both of which were solo dissents, he was opposed by a majority which included Quebec justices. In both of these latter cases Justice Cartwright defended an individual's rights against what he deemed to be the use of improper procedures by law-enforcement agencies. In *Wright v. Wright* [1951] S.C.R. 728, he was concerned with upholding an individual's right to be served with a notice of motion and supporting affidavits declaring him insane before being committed as mentally incompetent. Then again in *Brusch v. The Queen* [1953] 1 S.C.R. 373, he based his dissent on the view that a person who is charged with a particular criminal offence and in the subsequent proceedings is further accused of being an habitual criminal ought to be given an opportunity to decide whether the habitual criminal charge should be tried by a judge or jury. Justice Taschereau concurred with Justice Kellock's majority opinion in the *Wright* case, while Chief Justice Rinfret and Justice Fauteux were members of the majority in the *Brusch* case.

Cartwright's series of dissents in this early group of civil liberties cases indicates that it would be erroneous to describe the distribution of power on the Court as being that of a liberal English-speaking majority opposed by an illiberal French-speaking minority. Not only is there Justice Cartwright's switch from what might be thought of as the illiberal position in the *Boucher* and *Saumur* cases to the liberal, rights-of-the-individual position, in the *Wright* and *Brusch* cases, but the other side of that behaviour is the converse fluctuation of the majority's position.

The other two cases in this group, *Noble and Wolfe v. Alley* [1951] S.C.R. 64, and *The King v. Murakimi* [1951] S.C.R. 801, provide further support for the view that the issues and value-conflicts involved in these cases do not turn on a simple bipolar axis. In the *Noble and Wolfe* case the Court in a six-to-one division, with Justice Locke dissenting and Justice Taschereau concurring with the majority, released a purchaser of land from a clause in a deed which prohibited the transfer of the land to any person of the Jewish, Hebrew, Semitic or Negro race or blood. The other case, *The King v. Murakimi*, did not involve any of the Quebec judges. On this occasion Justice Cartwright was joined by three other judges, with Justice Estey dissenting,

in upholding a trial judge's acquittal of a person charged with unlawfully using instruments to procure a miscarriage, on the grounds that his statement to the police had not been given voluntarily.

Two of the bicultural issue cases, which were added to the civil liberties cases in Tables IV.7, IV.9, and IV.11, involved Quebec judges. One of these, *Taillon v. Donaldson* [1953] 2 S.C.R. 257, provided one of the best known examples of a common-law majority defeating a civilian minority on a question concerning the application of Quebec's Civil Code. Justices Taschereau and Fauteux in dissent unsuccessfully tried to establish the rights of natural parents to the custody of their children, but were defeated by Justices Cartwright, Kellock and Estey. The other case, *The King v. The Assessors of the Town of Sunnybrae Ltd*, [1952] 2 S.C.R. 76, touched religious rather than ethnic interests. It concerned the question of whether the facilities operated as a laundry business by a Roman Catholic girls' school were exempt from local assessment for property taxes. Chief Justice Rinfret, supported by fellow Roman Catholic Justice Kerwin and Protestant Justice Cartwright, would have upheld the school's claim for exemption, but were defeated by a four-judge Protestant majority. The third case in this group, *Schara Tzedek v. The Royal Trust Co.* [1953] 1 S.C.R. 31, concerned a dispute over the proper size of the fee charged for a Jewish funeral. In this case Rand alone dissented from a wholly Anglo-Saxon majority's judgment that a "fair and reasonable" fee was all that the synagogue could demand.

In the next set of Tables, IV.12 to IV.17, we have applied the same types of bloc-analysis to the Supreme Court's split decisions in cases involving civil liberties questions and bicultural issues for the years following Rinfret's departure from the Court until the end of 1964. Once again, as with our analysis of the Court's over-all decision-making during these years, we have constructed nine-judge tables for this 10-year period by aggregating the voting records of judges who left the Court during these years with the votes of their replacements.

An inspection of Tables IV.12 to IV.17 reveals that the bloc-behaviour which was fairly distinct on the "Rinfret" Court in this type of case, is less sharply defined on the "Abbott" Courts. Of course, the failure of any clear voting pattern to emerge among the non-Quebec judges may be primarily the result of aggregating the voting records of several judges together. However, it is more significant that in this group of cases, contrary to the general trend, with Justice Abbott replacing Chief Justice Rinfret, the three Quebec judges functioned much less as a cohesive bloc than they did on the "Rinfret" Court.

Looking first at the dissent Tables IV.12 and IV.13, we can observe some tendency for the dissents to be clustered in the bottom right-hand corner of the tables where the pairings of Quebec judges are recorded. But this tendency is much less marked than it was in the earlier period.<sup>30</sup> Also Justice Cartwright's pattern of dissents would appear to have undergone a change in this latter period. His

When we turn next to the two assent Tables IV.14 and IV.15, there seems to be even less evidence of anything that might be called a dominant majority bloc.<sup>31</sup> There is one negative point which these tables bring out: that is again the relatively low level of participation of the two French-speaking judges in the Court's majority in this set of decisions. The number of joint assents for both Justice Fauteux and Justice Taschereau declines as we look across their columns from right to left. On the other hand there is nothing significant about Justice Abbott's voting behaviour to distinguish it from that of the other members of the English-speaking majority.

Paired agreement in dissent in civil liberties cases, "Abbott"  
Courts, 1954-64

Judges	Cartwright	Locke-Hall	Kerwin-Spence	Estey-Nolan-Martland	Rand-Ritchie	Kellock-Judson	Abbott	Fauteux	Taschereau
Cartwright	(7)	1	-	-	1	1	1	1	1
Locke-Hall	1	(4)	2	-	-	-	-	1	2
Kerwin-Spence	-	2	(3)	1	-	-	-	1	1
Estey-Nolan-Martland	-	-	1	(1)	-	-	-	-	-
Rand-Ritchie	1	-	-	-	(2)	-	-	-	-
Kellock-Judson	1	-	-	-	-	(3)	2	1	1
Abbott	1	-	-	-	-	2	(4)	3	2
Fauteux	1	1	1	-	-	1	3	(5)	4
Taschereau	1	2	1	-	-	1	2	4	(6)

17 cases



Table IV.13

Paired agreement in dissent in civil liberties and bicultural issue cases, "Abbott" Courts, 1954-64

Judges	Cartwright	Locke-Hall	Kerwin-Spence	Estey-Nolan-Martland	Rand-Ritchie	Kellock-Judson	Abbott	Fauteux	Taschereau
Cartwright	(8)	1	1	-	1	1	1	1	1
Locke-Hall	1	(7)	4	-	-	-	1	1	2
Kerwin-Spence	1	4	(6)	1	-	-	1	1	1
Estey-Nolan-Martland	-	-	1	(2)	1	-	-	-	-
Rand-Ritchie	1	-	-	1	(5)	2	-	-	-
Kellock-Judson	1	-	-	-	2	(5)	2	1	1
Abbott	1	1	1	-	-	2	(5)	3	2
Fauteux	1	1	1	-	-	1	3	(5)	4
Taschereau	1	2	1	-	-	1	2	4	(6)

24 cases

Tables IV.16 and IV.17 recording ratios of interagreement for every pair of judges underline the extent to which Justice Abbott's replacing Chief Justice Rinfret diminished the cohesiveness of the Quebec bloc in these kinds of controversy. While Justices Fauteux and Taschereau continued to experience a very high degree of agreement (90 per cent and 92 per cent in the two tables), when Justice Abbott's record is taken into consideration, the average ratio of agreement for the Quebec judges turns out to be 73 per cent for civil liberties cases and 70 per cent for civil liberties plus other bicultural issue cases. Among the non-Quebec judges it is more difficult to pick out any well-defined blocs than it was for the earlier period; with Justice Judson's voting bracketed with Justice Kellock's, it becomes difficult to discern a centre bloc within the non-Quebec group. The combination of Justices Kellock and Judson would seem to have had nearly as much in common with the Quebec judges as with

Table IV.14

Paired agreement in assent in split decisions in civil liberties cases, "Abbott" Courts, 1954-64

Judges	Cartwright	Kerwin- Spence	Estey-Nolan- Martland	Locke-Hall	Kellock- Judson	Rand- Ritchie	Abbott	Fauteux	Taschereau
Cartwright	(9)	6	5	6	3	8	5	2	1
Kerwin- Spence	6	(8)	6	7	4	7	5	2	1
Estey-Nolan- Martland	5	6	(8)	5	5	8	5	3	2
Locke-Hall	6	7	5	(11)	5	7	6	3	4
Kellock- Judson	3	4	5	5	(7)	6	6	2	2
Rand- Ritchie	8	7	8	7	6	(13)	8	5	4
Abbott	5	5	5	6	6	8	(11)	4	5
Fauteux	2	2	3	3	2	5	4	(6)	5
Taschereau	1	1	2	4	2	4	5	5	(7)

17 cases

their non-Quebec brethren. The closest we can get to a centre bloc is the trio of combinations constituted by Justices Kerwin and Spence, the prairie Justices, Estey, Nolan and Martland and the Maritimes' representatives, Rand and Ritchie. Their average ratio of interagreement was a high 86 per cent for the civil liberties cases, although this still does not sharply distinguish them from the other English-speaking members of the Court. For the larger group of cases upon which Table IV.16 is based, their Index of Interagreement falls to 75 per cent and if Judge Abbott is included in this possible bloc instead of Justices Kerwin and Spence the Index only declines one point to 74 per cent.

We shall again make a very cursory examination of the issues involved in the cases upon which these tables were based in order to interpret the voting trends which the tables reveal. Looking first

Table IV.15

Paired agreement in assent in split decisions in civil liberties and bicultural issue cases, "Abbott" Courts, 1954-64

Judges	Kerwin- Spence	Kellock- Judson	Estey-Nolan- Martland	Locke-Hall	Cartwright	Rand- Ritchie	Abbott	Fauteux	Taschereau
Kerwin- Spence	(9)	4	6	8	7	7	5	2	1
Kellock- Judson	4	(10)	6	6	5	7	7	3	3
Estey-Nolan- Martland	6	6	(11)	6	7	10	6	3	2
Locke-Hall	8	6	6	(14)	9	7	6	4	5
Cartwright	7	5	7	9	(15)	10	7	4	3
Rand- Ritchie	7	7	10	7	10	(16)	9	6	5
Abbott	5	7	6	6	7	9	(13)	4	5
Fauteux	2	3	3	4	4	6	4	(8)	7
Taschereau	1	3	2	5	3	5	5	7	(9)
24 cases									

at the civil liberties cases which produced the dissents of the French Canadian judges, we find four very prominent cases which attracted nation-wide attention. Two of these, *Lamb v. Benoit* [1959] S.C.R. 321 and *Roncarelli v. Duplessis* [1959] S.C.R. 121, resulted from actions taken by Quebec authorities against members of the Jehovah's Witness religious sect. In the *Lamb* case the three Quebec judges disagreed with their six common-law colleagues who upheld an action for damages brought by a Jehovah's Witness against Quebec police officers who, she alleged, had improperly arrested her. But in the *Roncarelli* case, Abbott sided with the majority, while Cartwright joined the two French Canadian judges in upholding Premier Duplessis' defence against the charges of the Jehovah's Witness restaurateur, Roncarelli. The third case in this group, *Switzman v. Elbling* [1957] S.C.R. 285, resulted in the invalidation of Quebec's notorious "Padlock Law," but here Justice Taschereau dissented alone

Table IV.16

Ratios of interagreement in split decisions in civil liberties cases, "Abbott" Courts, 1954-64

Judges	Cartwright	Locke-Hall	Kerwin-Spence	Estey-Nolan-Martland	Rand-Ritchie	Kellock-Judson	Abbott	Fauteux	Taschereau
Cartwright		50	60	63	60	40	40	30	17
Locke-Hall	50		82	63	54	56	46	44	55
Kerwin-Spence	60	82		88	70	57	56	38	22
Estey-Nolan-Martland	63	63	88		100	71	63	38	22
Rand-Ritchie	60	54	70	100		67	57	50	36
Kellock-Judson	40	56	57	71	67		89	43	38
Abbott	40	46	56	63	57	89		70	58
Fauteux	30	44	38	38	50	43	70		90
Taschereau	17	55	22	22	36	38	58	90	
17 cases									

against all eight of his fellow judges. In the fourth case, *Brodie, Dansky, Rubin v. The Queen* [1962] S.C.R. 681 in which the Court's majority held Lawrence's novel, *Lady Chatterley's Lover* not to be obscene, the Court's division appears to have been based more on religious orientations, with the Court's three Roman Catholics joined in dissent by Justice Locke.

The other three cases in which Justices Taschereau or Fauteux were in the minority do not seem to involve issues especially susceptible to a bicultural division of opinion. In *Canadian Fishing Co. Ltd. et al. v. Smith et al.* [1962] S.C.R. 294, all three Quebec judges together with Justice Judson were in dissent, but the central issue involved in the case was whether the Restrictive Trade Practices Commission should be restrained from making available to the various parties against whom allegations had been made all the documents and evidence gathered by the Director of Research under the Combines



Table IV.17

Ratios of interagreement in split decisions in civil liberties and bicultural issue cases, "Abbott" Courts, 1954-64

Judges	Cartwright	Locke-Hall	Kerwin- Spence	Estey-Nolan- Martland	Rand-Ritchie	Kellock- Judson	Abbott	Fauteux	Taschereau
Cartwright		50	57	58	52	40	44	41	29
Locke-Hall	50		86	55	39	46	44	45	54
Kerwin- Spence	57	86		78	54	40	55	33	20
Estey-Nolan- Martland	58	55	78		92	60	67	33	20
Rand-Ritchie	52	39	54	92		69	56	50	39
Kellock- Judson	40	46	40	60	69		90	50	44
Abbott	44	44	55	67	56	90		64	54
Fauteux	41	45	33	33	50	50	64		92
Taschereau	29	54	20	20	39	44	54	92	
24 cases									

Investigation Act. Taschereau's other dissent came in *The Queen v. Neil* [1957] S.C.R. 685, where, together with Justice Locke, he disagreed with the majority's opinion that the evidence produced at Neil's trial was insufficient to warrant finding him guilty of being a criminal sexual psychopath. Similarly Justice Fauteux's other dissent came when he sided against the accused in a criminal case. This was in *Beaver v. The Queen* [1957] S.C.R. 531 where, supported by Justice Abbott, he disagreed with a majority judgment written by Justice Cartwright to the effect that the principle of *mens rea* should be read into some of the offences defined in the Opium and Narcotic Drug Act.

Once again in this series of cases, Justice Cartwright was the principal dissenter. And again a number of dissents found him defending an individual's rights or freedom against what he deemed to be the improper exercise of power by public authorities. Two of

these cases concerned the Lord's Day Act. In the first of these, *Gordon v. The Queen* [1961] S.C.R. 592, he dissented alone against all of his fellow justices who held that the Act applied to an automatic laundry business. In *Robertson and Rosetanni v. The Queen* [1963] S.C.R. 651, where the majority, consisting of the three Quebec judges plus Justice Ritchie, held that Section 4 of the Lord's Day Act prohibiting the operation of normal business undertakings on Sundays did not violate the Canadian Bill of Rights, he again dissented alone. He was involved in another solo dissent, this time against Justices Abbott, Taschereau, Judson and Hall, in *Españillat-Rodriguez v. The Queen* [1964] S.C.R. 3, where he defended the right of an ex-diplomat of the Dominican Republic, who was subject to an Immigration Department deportation order, to a fair hearing and a real opportunity to qualify for immigrant status. In *Frei v. The Queen* [1956] S.C.R. 462, Justice Cartwright joined by Justice Rand argued unsuccessfully for an immigrant farmer's right to a larger compensation payment for lands expropriated by the Crown.

Justice Cartwright's other two dissents were in cases which raised questions relating to trade union activities. The first case, *Patchett & Sons Ltd. v. Pacific Great Eastern Railway Co.* [1959] S.C.R. 271, involved the failure of a railway company to provide services to a struck plant. Justice Cartwright agreed with Justice Locke and found the railway company liable for the failure because it neglected to explain to its employees that their refusal to cross the picket-lines would be unlawful. Here he refused to impute to the employees knowledge of the unlawfulness of their action or to presume that they would have deliberately acted unlawfully. In the second case, *Oil Chemical and Atomic Workers' International Union v. Imperial Oil* [1963] S.C.R. 584, he upheld the political rights of trade unions and together with Justices Abbott and Judson dissented from the majority's finding that a British Columbia statute, preventing Trade Unions from using their funds either directly or indirectly to support a political party, was constitutional.

There were other occasions when the balance of power on the Court was more favourable to Justice Cartwright's position. In the *Neil* and *Beaver* cases where we noted dissents by Taschereau and Fauteux respectively, Cartwright was part of the majority which took the side of the accused in these criminal actions. Again in *Beatty et al. v. Kozak* [1958] S.C.R. 177, Justice Cartwright led the majority, with Justice Rand alone dissenting, in upholding a claim for damages brought against two Saskatchewan law-officers who without warrant had imprisoned a woman accused by her relatives of being mentally ill. The case of *E. Gagnon et al. v. Foundation Maritime Ltd.* [1961] S.C.R. 435, on the other hand, raised a question relating to trade unionism. On this occasion, in a division involving only non-Quebec judges, Justice Cartwright sided with the majority which found the union organizers guilty of a tortuous conspiracy in picketing and halting work on a construction site in order to gain recognition without certification.

*Dennis v. The Queen* [1958] S.C.R. 473, along with the *Robertson and Rosetanni* case (in which the Lord's Day Act was upheld) were examples of civil liberties cases in which the Quebec judges were the dominant element in the majority. In the *Dennis* case in which an individual's right to a new trial was at stake, Justices Taschereau and Fauteux joined by Justice Locke successfully upheld the Crown's side of the case, against Chief Justice Kerwin and Justice Martland. The final case in this group of 17 civil liberties cases provides an interesting example of the variations and shifts that different circumstances could bring about in the Supreme Court's alignments. In *Metropolitan Toronto v. Village of Forest Hill* [1957] S.C.R. 569, an unexpected alliance of the three Quebec judges, Justice Cartwright and Justice Rand denied Metropolitan Toronto the power of fluoridating the Metropolitan water supply. Chief Justice Kerwin and Justice Locke dissented. The case provided an interesting application of Justice Cartwright's individualist liberal philosophy: in his view the power vested in the Metropolitan authority to secure a supply of pure and wholesome water did not include the power to provide through that water system for "the compulsory preventative medication of the inhabitants of the area," [1957] S.C.R. 569 (at 580).

The seven bicultural issue cases which were added to the civil liberties cases to form the basis of Tables IV.13, IV.15, and IV.17 did not have any marked bearing on the voting patterns which we traced through the civil liberties cases. None of these cases produced a dissent by either Justice Taschereau or Justice Fauteux, and Justice Cartwright only dissented once. Six of the seven cases touched on various aspects of family relations (*Hepton v. Maat* [1957] S.C.R. 606—custody of children; *Hellens v. Densmore* [1957] S.C.R. 768—validity of a marriage; *Little v. Little* [1958] S.C.R. 566—divorce; *Thompson v. Thompson* [1961] S.C.R. 3—property in marriage; *Kruger v. Booker* [1961] S.C.R. 231—custody of children; In *Re Gage: Ketterer et al. v. Griffith et al.* [1962] S.C.R. 241—inheritance). In the seventh case, *A.-G. Ont. v. Barfried Enterprises* [1963] S.C.R. 570, the Court upheld the validity of Ontario's Unconscionable Transactions Relief Act, with Justices Martland and Ritchie dissenting.

Looking back now at our bloc-analysis of the Supreme Court's divisions in what we have identified as civil liberties and bicultural issue cases over the entire 15-year period, we might ask to what extent the Court's divisions in these controversies would appear to be explicable in bicultural, that is, essentially French-English terms? The least we can say in answer to that question is that there was a hard core of cases raising provocative issues upon which the French-Roman Catholic members of the Court nearly always agreed and were usually defeated by the English-Protestant majority. Most notable were the four cases involving clashes between the Jehovah's Witnesses and the Quebec government, namely the *Boucher*, *Saumur*, *Lamb* and *Roncarelli* cases. Along with these were four other cases containing issues with quite an immediate relationship to religious or ethical values, namely *McKee v. McKee*, *Taillon v. Donaldson*, *The King v. The Assessors of the Town of Sunnybrae Ltd.* and the *Brodie* case, in all



of which French Canadian Quebec judges were on the minority side of the Court. It is also noteworthy that Justice Abbott, the English-speaking Protestant replacement of Chief Justice Ginfret, was clearly less consistently in accord than was his predecessor with Justices Taschereau and Fauteux.

Still it would be a mistake to explain this voting trend in terms of French Canadian values being simply outvoted by English Canadian values in areas of law suspected of being especially sensitive to such a conflict of ethnic values. For the reasons advanced in Chapter II we cannot assume that the cause of this series of divisions is simply the fact that one group of judges are products of French Canadian culture and the others of English Canadian culture. The difference in ethnic backgrounds may be a necessary but by no means a sufficient cause of these divisions. That is why it is necessary, in order to assess the extent to which this voting pattern is an essentially bicultural phenomenon, to attempt in the next chapter a more careful qualitative analysis of the character of the conflict of attitudes in the most prominent cases in this area. There we must at least reflect on the reasonableness of identifying the values explicitly or implicitly manifested by the judges in these cases with either of Canada's major ethnic groups.

Although we must suspend judgment on the determinants of the Court's divisions in these cases, our analysis of these divisions at least shows the extent to which there is an identifiable power structure at work in these cases. Clearly the English Protestant majority on the Court have had a greater influence in determining the outcome of these cases than the French Catholic minority. Particularly in the first five years of the post-1949 period, four members of this group, Justices Rand, Kerwin, Wellock and Estey demonstrated a high degree of cohesion, and formed the nucleus of the majority which prevailed in direct confrontations with the Quebec minority. But in the latter decade, with both Justice Cartwright and Justice Locke relatively less isolated on these issues than they were on the "Rinfret" Court, and with Justice Abbott showing as much affinity for the non-Quebec majority as for his provincial confrères, it becomes much more difficult to discern any significant variation of influence among the Anglo-Saxon judges.

The one English-speaking judge who, outside of these critical cases involving the Jehovah's Witnesses in Quebec, manifested a fairly consistent and well-defined commitment to certain individualistic liberal values was Justice Cartwright. But the fluctuations in his fortunes, particularly over the last 10 years, illustrate the shifting nature of the Court's balance of power in these cases. Aside from the direct confrontations with the French Catholic judges in the Jehovah's Witness cases and the other quarter of cases raising provocative religious or moral questions, the Court's majority does not seem to have exercised its power in any predictable direction. Unless we are willing to believe that the members of the Court's majority kept changing their minds on the basic values involved in these cases, the more plausible explanation of the absence of consistent



alliances is that the bulk of the cases did not turn on a single bipolar set of alternative value-judgments.

### 3. *Voting patterns in cases involving Quebec's Civil Code*

The Civil Code cases upon which this analysis is based were derived from Question 8 of our main questionnaire which was applied to all of the Supreme Court's post-1949 decisions.<sup>32</sup> They include all the Court's split decisions in those cases in which the application or interpretation of Quebec's Civil Code was a central issue. In the final section of this chapter we report the results of our study of the Supreme Court's treatment of Quebec appeals from the Court's beginning in 1875 until the end of 1964. There our aim will be to discover the weight, direction, and variations over time of the non-Quebec judges' participation in the various types of Quebec appeal cases. Here we have applied the same kind of bloc-analysis as we employed in the two previous sections to the Court's divisions in Civil Code cases<sup>33</sup> in the post-1949 period. Our purpose here was to ascertain the extent to which provincial or ethnic blocs function in those cases.

In Tables IV.18 to IV.23 we have set out dissenting pairs, assenting pairs and ratios of interagreement for Supreme Court divisions in Civil Code cases and have organized the data into the same two "Rinfret" and "Abbott" periods as were used in the preceding subsections. Contrasting this series of tables with the civil liberties and bicultural issue tables which we examined above, we can observe that the most obvious difference between French-English relations on the Court in the two sets of cases, is that the Quebec judges have been far more effective in determining the Court's decisions in the Civil Code cases than in the civil liberties and bicultural issue cases. The assent Tables IV.19 and IV.22 show that the Quebec judges have been more frequently on the majority side in these divisions<sup>34</sup> than have the non-Quebec judges. Certainly this is a switch from the situation in the civil liberties and bicultural issue cases. This difference can be partially explained simply by the tendency for the Court to be composed differently when sitting for the two sets of cases. For most Civil Code cases five judges sit, three of whom are almost always the Quebec judges, whereas in a great many of the bicultural issue and civil liberties cases the Quebec judges were part of a seven- or nine-judge Court which, *ceteris paribus*, meant that it was less likely that they would be on the majority side in the Court's divisions.

What is more interesting than the Quebec judges' higher level of participation in the majority in these cases is their relative lack of cohesiveness compared with their own record in the civil liberties and bicultural issue cases. Of course, we must remember that we are dealing here only with split decisions in Civil Code cases and that besides these 44 cases there were 144 others in which the Court was unanimous. Still it is significant that when the Court divided on questions relating to the Civil Code, Chief Justice Rinfret agreed with his fellow civilians only 50 per cent of the time. Also as

Table IV.21

Paired agreement in dissent in Civil Code cases, "Abbott" Courts, 1954-64

Judges	Taschereau	Fauteux	Abbott	Estey-Nolan-Martland	Kerwin-Spence	Kellock-Judson	Locke-Hall	Rand-Ritchie	Cartwright
Taschereau	(8)	6	1	-	-	-	1	-	1
Fauteux	6	(7)	1	-	-	1	1	-	-
Abbott	1	1	(3)	-	1	-	-	1	-
Estey-Nolan-Martland	-	-	-	(-)	-	-	-	-	-
Kerwin-Spence	-	-	1	-	(1)	-	-	-	-
Kellock-Judson	-	1	-	-	-	(2)	-	1	-
Locke-Hall	1	1	-	-	-	-	(4)	-	-
Rand-Ritchie	-	-	1	-	-	-	1	(9)	4
Cartwright	1	1	-	-	-	-	-	4	(9)
26 cases									

We should further note that unlike common-law judges who were relatively infrequent participants in these cases, Justices Cartwright and Rand (or Ritchie) were relatively independent of each other, their ratio of agreement being only 50 per cent throughout. What this indicates is that within the group of five judges—the three civilians and Justices Cartwright, Rand or Ritchie—who took part most often in these Civil Code cases, the balance of power, on the whole, favoured the civilians. The three civilians with their greater cohesiveness have more often than not prevailed in a division against either or both of these common-law judges. And even when the civilian judges split, there was a good chance that Justices Rand and Cartwright would also split, if both were present together, so that on a five-judge court two civilians would still dominate the majority. However, when the other common-law judges entered into these decisions the picture was likely to change. If two of them were

Table IV.20

Ratios of interagreement in split decisions in Civil Code cases, "Rinfret" Court, 1950-4

Judges	Tasche- reau	Fauteux	Rinfret	Estey	Kerwin	Locke	Kellock	Cart- wright	Rand
Taschereau		79	50	38	45	40	-	45	-
Fauteux	79		50	33	60	-	29	78	13
Rinfret	50	50		71	20	60	50	33	50
Estey	38	33	71		100	67	100	75	50
Kerwin	45	60	20	100		100	100	67	67
Locke	40	-	60	67	100		100	33	75
Kellock	-	29	50	100	100	100		40	100
Cartwright	45	78	33	75	67	33	40		50
Rand	-	13	50	50	67	75	100	50	

18 cases

Table IV.23 indicates, after Justice Abbott replaced Chief Justice Rinfret, the civilians become a more cohesive group, with an Index of Interagreement of .74 compared with one of just under .60 for the "Rinfret" Court. Still in those cases where the civilians split, the balance of power on a five-judge court would certainly shift away from the civilians and the common-law judges would be in a position to determine the outcome of the civilian controversy. Thus it is significant that compared to the moderate level of interagreement exhibited by the civilian judges, a quartet of common-law judges, Justices Estey, Kerwin, Kellock and Locke (and their replacements), displayed a much higher degree of cohesiveness—.95 in the first five years and .84 in the last 10.

Indeed when we begin to put these tables together and take into account the relative participation of each group of judges in these decisions, a fairly distinct pattern emerges. The four common-law judges who displayed a very high propensity to agree with one another were also the four judges who participated the least in these Civil Code decisions.<sup>35</sup> They were also the four who dissented the least both in aggregate and proportionate terms. Of the 60 votes cast by Justices Estey, Kerwin, Kellock, Locke and their replacements in these 44 Civil Code decisions, only 12 or 20 per cent recorded dissents. Compared with this the civilian Quebec judges cast 122 votes, of which 35 or 29 per cent were in dissent. At the other corner of the Court, Justices Cartwright and Rand (with Justice Ritchie), the most active common-law participants in Civil Code divisions, cast half of their 54 votes in dissent.<sup>36</sup>

Table IV.21

Paired agreement in dissent in Civil Code cases, "Abbott" Courts, 1954-64

Judges	Taschereau	Fauteux	Abbott	Estey-Nolan-Martland	Kerwin-Spence	Kellock-Judson	Locke-Hall	Rand-Ritchie	Cartwright
Taschereau	(8)	6	1	-	-	-	1	-	1
Fauteux	6	(7)	1	-	-	1	1	-	-
Abbott	1	1	(3)	-	1	-	-	1	-
Estey-Nolan-Martland	-	-	-	(-)	-	-	-	-	-
Kerwin-Spence	-	-	1	-	(1)	-	-	-	-
Kellock-Judson	-	1	-	-	-	(2)	-	1	-
Locke-Hall	1	1	-	-	-	-	(4)	-	-
Rand-Ritchie	-	-	1	-	-	-	1	(9)	4
Cartwright	1	1	-	-	-	-	-	4	(9)
26 cases									

We should further note that unlike common-law judges who were relatively infrequent participants in these cases, Justices Cartwright and Rand (or Ritchie) were relatively independent of each other, their ratio of agreement being only 50 per cent throughout. What this indicates is that within the group of five judges—the three civilians and Justices Cartwright, Rand or Ritchie—who took part most often in these Civil Code cases, the balance of power, on the whole, favoured the civilians. The three civilians with their greater cohesiveness have more often than not prevailed in a division against either or both of these common-law judges. And even when the civilian judges split, there was a good chance that Justices Rand and Cartwright would also split, if both were present together, so that on a five-judge court two civilians would still dominate the majority. However, when the other common-law judges entered into these decisions the picture was likely to change. If two of them were



Table IV.22

Paired agreement in assent in split decisions in Civil Code cases, "Abbott" Courts, 1954-64

Judges	Taschereau	Fauteux	Abbott	Estey-Nolan-Martland	Kerwin-Spence	Kellock-Judson	Locke-Hall	Rand-Ritchie	Cartwright
Taschereau	(18)	16	14	4	4	1	-	4	3
Fauteux	16	(18)	14	4	5	1	-	3	4
Abbott	14	14	(20)	4	10	3	1	4	4
Estey-Nolan-Martland	4	4	4	(7)	3	2	2	3	2
Kerwin-Spence	4	5	10	3	(11)	4	2	2	4
Kellock-Judson	1	1	3	2	4	(6)	3	3	3
Locke-Hall	-	-	1	2	2	3	(3)	3	2
Rand-Ritchie	4	3	4	3	2	3	3	(6)	1
Cartwright	3	4	4	2	4	3	2	1	(8)
26 cases									

participating together on a five-judge court and the civilians split, they would most likely, with their tendency to vote as one judge, determine the outcome of the case. Furthermore, we can see from the Interagreement Tables IV.20 and IV.23 that the members of this common-law bloc (in the centre of each table) agreed with the two common-law judges to their right, Justices Cartwright and Rand (or Ritchie), more frequently than they did with the two veteran civilians, Justices Taschereau and Fauteux, on their left. Thus on balance this group of common-law judges appears to have used its majoritarian power more in support of the common-law "veterans" in these Civil Code divisions than in support of the civilian "veterans."

This analysis of voting does not enable us to assess the real impact of these judicial decisions on Quebec's distinctive system of private law. However, if one accepts the assumption shared by most of the Supreme Court's Quebec critics, namely, that judges whose

Table IV.23

Ratios of interagreement in split decisions in Civil Code cases, "Abbott" Courts, 1954-64

Judges	Taschereau	Fauteux	Abbott	Estey-Nolan-Martland	Kerwin-Spence	Kellock-Judson	Locke-Hall	Rand-Ritchie	Cartwright
Taschereau		88	65	57	33	13	14	27	23
Fauteux	88		68	67	42	25	14	21	31
Abbott	65	68		67	92	50	17	39	29
Estey-Nolan-Martland	57	67	67		100	100	100	50	50
Kerwin-Spence	33	42	92	100		80	50	67	57
Kellock-Judson	13	25	50	100	80		75	100	60
Locke-Hall	14	14	17	100	50	75		50	40
Rand-Ritchie	27	21	39	50	67	100	50		50
Cartwright	23	31	29	50	57	60	40	50	
26 cases									

educational and professional experience has not been in the civil-law tradition are necessarily less competent in civil-law matters than those judges who have been formally trained in the civilian system, then the voting pattern we have traced may be viewed as a disquieting trend. For one way of interpreting this phenomenon is to look upon all these cases as involving strictly technical questions of Quebec civil law. From this point of view the voting pattern we have traced might be interpreted as showing that the common-law judges who are least experienced in adjudicating Quebec civil-law disputes, take part in some of the more contentious disputes centering on the Civil Code and frequently decide the issue by throwing their weight against the civilian judges on the Court. But it might also be argued that many of these so-called "Civil Code" cases are contentious because they involve issues which go beyond a simple dichotomy of civil-law *versus* common-law concepts. We know for instance that a number of

cases included in this group, such as *Roncarelli v. Duplessis* [1959] S.C.R. 321 and *Lamb v. Benoit* [1959] S.C.R. 321, besides involving questions related to the interpretation of Quebec's Civil Code, also, in the eyes of some judges, raised broad questions of civil liberties. In these cases, instead of interpreting the common-law judges' defeat of two or three civilian judges as the result of a rather amateurish or alien treatment of Quebec civil law prevailing against a much more highly qualified version of civilian jurisprudence, it might be more plausible to explain the division between the two groups of judges as stemming from the fact that on a normative rather than a strictly technical legal basis they have focused on different values or issues as the crucial elements in the controversy.

Finally one general aspect of these tables provides some further confirmation of the general trend we have been tracing throughout our analysis of judicial alliances and cleavages; that is, with few exceptions all of the non-Quebec judges have agreed with each other in these Civil Code appeals relatively more often than with the Quebec judges. If we look at the array of figures showing ratios of inter-agreement for the six common-law judges we can see in both Tables IV.20 and IV.23 how these ratios tend to decline as we move from the six columns on the right to the three columns on the left recording interagreement ratios for pairings of civilian and common-law judges. The average ratio of interagreement among the non-Quebec judges was .69, whereas the average ratio of agreement of the six non-Quebec judges with the Quebec judges was only .37. Again the greater affinity which the non-Quebec judges have shown for each other in these Civil Code cases may stem from their common-law approach to civil-law matters or it might, in part, be the product of a broader normative divergence of the Anglo-Saxon judges from at least their French Canadian civilian colleagues.

#### 4. *Voting patterns in constitutional cases and other legal categories*

The same methods of bloc-analysis which were used above in analyzing judicial voting behaviour in civil liberties, bicultural issues, and Civil Code cases were also applied to the Supreme Court's post-1949 reported decisions in four other areas—constitutional law, governmental litigation (non-criminal), common law, and criminal law. In none of these areas, however, did bloc-analysis reveal a marked tendency for the Court to divide along bicultural or provincial lines. Consequently we have not set out all of these tables in the text, nor commented on this material in any detailed way.

Of these four areas, the one in which bloc behaviour or its absence might be regarded as most significant is constitutional law. Thus, in a rather contracted way, we have set out the voting record in the Supreme Court's split decisions dealing with constitutional challenges to the validity of legislation since 1949. There were 17 such decisions reported in the entire 15-year period. In Tables IV.24, IV.25, and IV.26 we have recorded dissenting pairs, assenting pairs and ratios of agreement, respectively, for the entire set of 17

cases. We have been able to present these data in the form of a nine-judge table by adopting even more extensive contraction than was used above, for here we have welded together the records of Chief Justice Rinfret and Justice Abbott so that only the records of the three judges—Taschereau, Fauteux and Cartwright—who served throughout the entire period, are presented in their pure form. Still we feel that nothing is lost this way in terms of revealing bloc behaviour. Our study of the voting patterns on each Court did not indicate any suggestion of bloc behaviour which might be masked by the rather extreme form of contraction used in building these tables.

When we examine these three tables, we do see at least the suggestion of a voting pattern with possible bicultural determinants. We can see in the top right-hand corner of Table IV.26 that Justices Taschereau and Fauteux were paired together in a high (91) percentage of cases. At the opposite corner we observe that Justice Cartwright and the combination of Justices Locke and Hall were paired together in 80 per cent of their joint participations and that their ratios of interagreement with the other judges tend to decline as we move across the table from right to left towards the Quebec justices. However, the significance of this particular pattern as something peculiar to the Court's divisions of opinion on constitutional law diminishes somewhat when we compare Table IV.26 with Tables IV.4 and IV.5 above showing ratios of interagreement for the Court's split decisions in all types of law in the post-1949 years. This comparison shows that to a degree the voting pattern in constitutional controversies is a microcosm of the general alignments on the Court from 1954 to 1964. The close alliance of Justices Taschereau and Fauteux has been a constant factor in the Court's divisions and was only slightly more intense in these constitutional cases than it was on the average in all of the Court's split decisions. Also the relative isolation of Justices Cartwright and Locke<sup>37</sup> from their fellow judges was again a general phenomenon of the last decade, although in constitutional law their ratios of agreement show a much greater tendency to slope off from their own high level of accord to much lower ratios of agreement with the other members of the Court.

When we examine the dissent and assent tables, again it is difficult to discover anything distinctive about the voting behaviour of the Quebec judges in these constitutional law decisions. Unlike their record in bicultural issue and civil liberties cases their quantity of dissents is about average and, similarly, in contrast with their record in Civil Code split decisions their participation in the majority is, on the whole, indistinguishable from that of the centre group of non-Quebec judges.

The most significant voting trend shown by these tables is related to the record of Justice Cartwright. As we can see from Table IV.24 he was the most frequent dissenter and aside from his relatively close alliance with Justice Locke, was more often than not in disagreement with his colleagues' interpretation of the B.N.A. Act. When we examine the actual cases which provoked Justice Cartwright's dissents we find that his position was consistently adverse to



Table IV.24

Paired agreement in dissent in constitutional cases, 1950-64

Judges	Taschereau	Fauteux	Rinfret- Abbott	Kerwin- Spence	Estey-Nolan- Martland	Kellock- Judson	Rand-Ritchie	Locke-Hall	Cartwright
Taschereau	(3)	1	1	1	-	-	-	-	-
Fauteux	1	(1)	1	-	-	-	-	-	-
Rinfret- Abbott	1	1	(3)	-	-	1	-	-	1
Kerwin- Spence	1	-	-	(3)	2	-	-	-	-
Estey-Nolan- Martland	-	-	-	2	(5)	-	1	1	1
Kellock- Judson	-	-	1	-	-	(1)	-	-	1
Rand-Ritchie	-	-	-	-	1	-	(2)	1	1
Locke-Hall	-	-	-	-	1	-	1	(6)	4
Cartwright	-	-	1	-	1	1	1	4	(7)
17 cases									

provincial interests. In six of the seven constitutional cases in which Justice Cartwright dissented, the Court's majority found a provincial act valid.<sup>38</sup> We might further note that Justices Taschereau and Fauteux were members of the majority in all six of these cases and Justice Abbott participated in the majority in all but one.

Justice Cartwright's six dissents came in the last seven years of the post-1949 period, at a time when provincial aggressiveness and the spirit of co-operative federalism were beginning to reverse the centralist trend of Canada's post-war federal system. On the Supreme Court the majority against whom Cartwright was frequently dissenting seem to reflect this trend in Canadian federalism by their marked willingness to find a constitutional basis for some of the provinces' new legislative ventures. But this apparent conflict between Justice Cartwright and, from the provinces' point of view, the more accommodating Supreme Court majority, could not be explained in terms either of bicultural or provincial blocs. In only one of Justice

Table IV.25

Paired agreement in assent in split decisions in constitutional cases, 1950-64

Judges	Taschereau	Fauteux	Rinfret-Abbott	Kerwin-Spence	Estey-Nolan-Martland	Kellock-Judson	Rand-Ritchie	Locke-Hall	Cartwright
Taschereau	(13)	9	7	9	7	10	10	6	7
Fauteux	9	(10)	6	8	7	8	8	4	4
Rinfret-Abbott	7	6	(9)	8	6	7	6	4	3
Kerwin-Spence	9	8	8	(12)	9	11	9	5	6
Estey-Nolan-Martland	7	7	6	9	(11)	9	9	5	5
Kellock-Judson	10	8	7	11	9	(14)	10	7	9
Rand-Ritchie	10	8	6	9	9	10	(13)	7	8
Locke-Hall	6	4	4	5	5	7	7	(9)	8
Cartwright	7	4	3	6	5	9	8	8	(10)
17 cases									

Cartwright's six defeats (*The Oil Chemical and Atomic Workers' case*), was the division close. In the other five cases it was a broad alliance of English and French Canadian judges from a variety of provinces that held the balance of power.

While we have not set out the Supreme Court's voting patterns in the other legal categories investigated, we have certainly examined all of the tables produced for these groups of cases and none of them revealed even as marked voting patterns as we detected in constitutional cases. This negative evidence, of course, showing the absence of bicultural or provincial divisions of the Court in common law, criminal law, and government litigation cases, is in itself significant.

For anyone who might be interested in investigating any aspect of the Supreme Court judges' voting behaviour in the cases we have considered, we have a computer print-out recording for each set of

Table IV.26

Ratios of interagreement in split decisions in constitutional cases, 1950-64

Judges	Taschereau	Fauteux	Rinfret- Abbott	Kerwin- Spence	Estey-Nolan- Martland	Kellock- Judson	Rand- Ritchie	Locke-Hall	Cartwright
Taschereau		91	73	71	47	71	67	40	44
Fauteux	91		77	89	70	80	73	40	36
Rinfret- Abbott	73	77		73	50	80	60	40	33
Kerwin- Spence	71	89	73		79	85	69	36	40
Estey-Nolan- Martland	47	70	50	79		64	71	43	38
Kellock- Judson	71	80	80	85	64		77	54	67
Rand- Ritchie	67	73	60	69	71	77		57	60
Locke-Hall	40	40	40	36	43	54	57		80
Cartwright	44	36	33	40	38	67	60	80	
17 cases									

cases, assenting and dissenting pairs as well as paired participation and absenteeism. These sets include all decisions, all split decisions and all close decisions in seven legal categories (civil liberties and bicultural issues, Civil Code, common law, criminal law, non-criminal governmental litigation, and constitutional law) for each composition of the Court, as well as for several aggregated Courts. This print-out is far too large to be reproduced in our Appendices but a copy can be obtained from the author.

#### *D. Quebec Appeals, 1875-1964*

In this part of our quantitative study we have undertaken an intensive examination of Quebec appeals to the Supreme Court from the Court's very beginning until the end of 1964. Again our data consist

of all the Court's reported decisions as found in the official Supreme Court Reports. To each case we have applied the following questions:

- 1) What type of law was involved?
- 2) How did the Supreme Court dispose of the appeal?
- 3) In what way did Quebec and non-Quebec judges participate in the Court's decision?
- 4) Who wrote the judgment(s)?

Unlike the lengthy questionnaire which was applied to the Court's post-1949 decisions, this short set of questions was answered mainly by reading the head-notes to cases rather than all of the opinions.

This questionnaire is, then, much briefer than that which was used on the post-1949 decisions. Three of the four questions can be answered quite objectively. The first question which concerns classifying the case into a particular legal category involves perhaps some degree of judgment on the part of the person administering the questionnaire.<sup>39</sup> However, the legal categories which we have chosen are fairly simple and do not go beyond a purely legal taxonomy; there is no attempt to identify those cases, for instance, which have a bearing on important social or libertarian values. The legal classifications employed here are shown across the top of Table IV.27. They are mutually exclusive and exhaustive. It might be noted that the category entitled "Federal statute and Quebec law" (column d) includes cases in which the application of a Canadian statute is related to a question concerning Quebec's Civil Code. Also it should be noted that the classification "Criminal" (column f) includes only federal criminal law cases. Thus the cases in columns d to g are all concerned with questions of federal import. The method of classifying the various outcomes of appeals is more refined than that used in the larger questionnaire. The various classifications are shown down the left side of Table IV.27. Appeals in which the Supreme Court agreed in part with the decision below are classed as "varied" (row 2) and those in which the case was decided not on the merits but on some jurisdictional ground are marked "jurisdictional" (row 4).

The main object of this quantitative analysis of Quebec appeals is simply to measure the weight and direction of the involvement of Quebec and non-Quebec Supreme Court judges in Quebec appeal cases. In the historical section above we described how the question of common-law judges reviewing the decisions of Quebec courts has always been the principal source of Quebec hostility to the federal appeal court. Here we seek only to discover the extent to which non-Quebec judges have controlled the Supreme Court's decision-making in Quebec appeals and the legal areas in which the civilian judges have most often been out-voted by their common-law colleagues.

Table IV.27 provides an over-all picture of the Supreme Court's treatment of Quebec appeals from 1875 to 1964. It presents a cross-tabulation of the various legal classifications with the Supreme



Table IV.27  
Quebec appeals, 1875-1964

Disposition by Supreme Court	Type of law								
	a Civil Code	b Quebec statute	c Quebec statute & Civil Code	d Federal statute & Quebec law	e Federal statute	f Criminal	g Constitu- tional	h Other	Total
1. Affirmed	452 (.62)	93 (.62)	47 (.47)	29 (.41)	46 (.23)	38 (.43)	22 (.55)	4 (.57)	731 (.53)
2. Varied	17 (.02)	4 (.03)	6 (.06)	3 (.04)	3 (.01)	1 (.01)	1 (.025)	0	35 (.02)
3. Reversed	256 (.35)	42 (.28)	47 (.47)	27 (.38)	29 (.14)	40 (.45)	16 (.40)	3 (.43)	460 (.33)
4. Jurisdic- tional	7 (.01)	12 (.07)	0 (.00)	12 (.17)	124 (.62)	10 (.11)	1 (.025)	0	166 (.12)
Total	732 (1.00)	151 (1.00)	100 (1.00)	71 (1.00)	202 (1.00)	89 (1.00)	40 (1.00)	7 (1.00)	1392 (1.00)

Court's disposition of Quebec appeals. This table does not show any very significant variations in the Supreme Court's approach to the different kinds of law involved in Quebec appeal cases. The one possible exception to this is column e, showing a very low reversal rate for cases concerning federal statutes. However, it is clear that the principal reason for this is the fact that over 60 per cent of these appeals turned on jurisdictional questions and consequently were not decided on the merits. This table indicates that over the whole span of the Supreme Court's appellate experience it has not shown a marked tendency in any particular legal category to follow or to upset the decision of the Quebec court of last resort. In cases concerned solely with the application of the Civil Code (column a) or a Quebec statute (column b), the percentages of cases in which the Supreme Court reversed or varied the decision of the court below were slightly lower—37 per cent and 31 per cent respectively—than in the other legal categories. However, this tendency is counterbalanced by the appellate record in the mixed categories (columns c and d) where interpretation of the Civil Code was related to the application of a provincial or federal statute. Here the lower court decision was reversed or varied in 53 per cent and 39 per cent of the two categories respectively. Thus, in so far as Quebec's distinctive legal system was concerned, the Supreme Court over the years cannot be said to have shown a marked degree of respect for the judgments of Quebec's highest courts.

Perhaps the most interesting aspect of the data reported in Table IV.27 is simply what it reveals about the composition of the Supreme Court's case load in Quebec appeals. Over half (53 per cent) of all Quebec appeals have been concerned essentially with legal questions arising under Quebec's Civil Code. Moreover if we add to these cases those which are centred on Quebec statutory law or Quebec statutory law combined with the Civil Code, we find that 71 per cent of the province's appeals to the Supreme Court have been primarily concerned with provincial law matters. Clearly, if, as some Quebec critics of the Court have advocated, the Court was reorganized so that a specialized banc of the Court was established to deal with civil-law matters, this civilian chamber of the Court would hear the bulk of Quebec appeals.<sup>40</sup>

Now when we turn to examine the respective roles of Quebec and non-Quebec Supreme Court judges in Quebec appeals, the first point that must be emphasized is the essential difference between the pre-1949 and post-1949 periods. It will be recalled that the Supreme Court Amendment Act of 1949 increased the number of judges from seven to nine with the requirement that three of the nine must be appointed from the bar or bench of Quebec. Originally the Court had been composed of six judges, two of whom had to be Quebec appointments. In 1927 a seventh judge was added but the requisite number of Quebec judges was not increased.

Thus in the pre-1949 period only two Quebec judges were required on the Court and this legal requirement was never exceeded. When we bear in mind that with very few exceptions five judges are needed to

constitute a quorum and even in those few instances where the Act permits less than five<sup>41</sup> it requires at least four, it is clear that prior to the addition of the third Quebec judge, the Quebec members of the Supreme Court in no appeal could constitute a majority of the Court. After 1949, when the Court sat as a five-judge court as it does for most appeals, the three Quebec judges could outnumber their common-law brethren.

When we look at the actual figures for the Supreme Court's composition, it is apparent that the addition of one Quebec judge has had the effect of greatly increasing the potential power of Quebec judges to control the Court's decision-making in Quebec appeals. In just under three-quarters (180 of 246, or 73 per cent) of all reported Quebec appeals since 1949 the three Quebec judges constituted a clear majority of the Court. Twenty-five of the 66 cases in which the Quebec judges did not constitute a majority concerned federal legal issues: 15 of these were criminal cases and five were constitutional cases—for these cases a seven- or nine-judge court usually sits. The remaining 41 were strictly concerned with provincial law matters: 34 solely with the Civil Code, six with the Civil Code and other Quebec statutory law and one with a Quebec statute alone. This group of 41 represents 22 per cent of reported Quebec appeals in these provincial law matters for this 15-year period.

Although the evidence presented in the last paragraph demonstrates the real expansion of the Quebec judges' influence over Quebec appeal cases which was produced by the addition to the Court of another Quebec judge in 1949, it may still leave civilian critics of the Court dissatisfied. There are some who have advocated that as a minimal reform an *ad hoc* judge be added to the Court whenever in a Quebec appeal three Quebec judges cannot be present. The figures cited above suggest that if this reform were adopted at least for those cases which are concerned with provincial law matters, such *ad hoc* appointments would have to be made about five or six times a year.<sup>42</sup>

Even though in 100 per cent of Quebec appeals prior to the 1949 change the Quebec judges constituted less than a majority of the judges sitting for a case, it is still instructive to ascertain more precisely the role which the Quebec members of the Court played in the different categories of Quebec appeals. To do this we have cross-tabulated in Tables IV.28 to IV.31 the various types of law involved in Quebec appeals with the main alternative forms of participation of Quebec judges. First of all we have indicated the various ways in which the opinions of Quebec judges have failed to prevail in Quebec appeals, beginning with the few cases in which they have lost by default (i.e. in which there have been no Quebec judges present to hear the appeal). Then we have shown those in which all the Quebec justices sitting on the case (one or two in the pre-1949 era; one, two or three, after 1949) were defeated by judges from the other provinces. Finally the tables show those in which the Quebec judges have not agreed with one another. The latter outcome prior to 1949 meant that non-Quebec judges would necessarily constitute more than

half the majority. After 1949, if such split decisions occurred within a five-judge court, three of whom were from Quebec, it was still possible for a Quebec judge to dissent but leave his two provincial colleagues as the dominant element in the majority. We have also tabulated those cases in which the Quebec judges have all participated in the majority. We have shown separately those few decisions in which the Quebec justices constituted more than half the majority. Finally for the pre-1949 era we have indicated those cases in which only one of the two Quebec judges was present to participate in the majority.

In Tables IV.28, IV.29, and IV.30 we have divided the pre-1949 years into three periods. The first period runs from the Court's beginning until 1895. It includes the terms of the first two appointees, Jean Thomas Taschereau and the ex-Liberal Justice Minister, Téléphore Fournier and the first 17 years of the term of Jean Thomas' cousin, Henri Elzéar Taschereau. The second period begins with the appointment of Désiré Girouard who had been an outspoken parliamentary critic of the Court, and includes the term of another ex-Liberal Justice Minister, Sir Charles Fitzpatrick, as well as the first seven years of Louis Brodeur's justiceship. The third period begins with the appointment of Pierre Mignault in 1918 and goes right up to the abolition of Privy Council appeals in 1949. Thus it includes, besides Mignault's term, those of Arthur Malouin and Arthur Cannon, as well as the first 25 years of Thibaudeau Rinfret's justiceship and chief justiceship and the first decade of the term of the present Chief Justice, Robert Taschereau. Table IV.31 includes all of the post-1949 appeals. It thus covers cases heard by Chief Justice Rinfret, the present Chief Justice, and the two Quebec judges appointed since 1949, Joseph Honoré, Gérald Fauteux (1949) and Douglas Abbott (1954).

Organizing the data in these periods represents a compromise between, on the one hand, not separating the data into different periods at all (or possibly simply into a pre-1949 and post-1949 period) and on the other hand, producing a separate Court for each combination of Quebec judges. Period I may be regarded as representing the Court's earliest days when as we have seen it was the object of sharp criticism from both English- and French-speaking jurists. Period II represents a time when the Court was emerging from the controversy of the 1870's and 1880's and beginning to assume a more secure position in the Canadian judicial structure. Period III is the period of its maturity when it was favoured by some particularly strong Quebec appointments, especially Justices Mignault and Rinfret. Finally Period IV includes the Court's modern period when the Quebec judges have held the balance of power in a majority of Quebec appeals. On balance it was felt that this division of Quebec appeals into four periods might be a convenient way of revealing any significant general changes in the participation of Quebec judges which have taken place over time.

The first point of interest which emerges from these tables is that there appears to be no significant differences between the different



Table IV.28  
Quebec judges' participation in Quebec appeals—Period I (1877-95)

Quebec judges' participation	Type of law								
	a Civil Code	b Quebec statute	c Quebec statute & Civil Code	d Federal statute & Quebec law	e Federal statute	f Criminal	g Constitutional	h Other	Total
1. No Quebec judges	0	0	0	0	0	0	0	0	0
2. Quebec judges (1 or 2)—in dissent	6 (.04)	2 (.06)	0	0	1 (.02)	1 (.17)	1 (.08)	0	11 (.04)
3. Quebec judges split	29 (.21)	6 (.18)	5 (.46)	5 (.46)	10 (.16)	0 (.08)	1	0	56 (.21)
4. 1 Quebec judge in assent	24 (.19)	7 (.21)	4 (.36)	3 (.27)	19 (.30)	0	4 (.31)	0	61 (.23)
5. 2 Quebec judges in assent, but non-Quebec judges $\frac{1}{2}$ or more of majority	72 (.54)	18 (.55)	2 (.18)	3 (.27)	29 (.46)	5 (.83)	7 (.53)	0	136 (.50)
6. 2 Quebec judges in assent and more than $\frac{1}{2}$ of majority	3 (.02)	0	0	0	4 (.06)	0	0	0	7 (.03)
Total	134 (1.00)	33 (1.00)	11 (1.00)	11 (1.00)	63 (1.00)	6 (1.00)	13 (1.00)		271 (1.00)

Table IV.29  
Quebec judges' participation in Quebec appeals-Period II (1896-1918)

Quebec judges' participation	Type of law							
	a Civil Code	b Quebec statute	c Quebec statute & Civil Code	d Federal statute & Quebec law	e Federal statute	f Criminal	g Constitu- tional	h Other Total
1. No Quebec judges	1 (.00)	0	0	0	0	0	0	1 (.00)
2. Quebec judges (1 or 2)-in dissent	8 (.04)	3 (.06)	1 (.05)	1 (.04)	2 (.03)	0	0	15 (.04)
3. Quebec judges split	36 (.15)	6 (.12)	5 (.26)	2 (.08)	6 (.09)	4 (.44)	3 (.375)	62 (.15)
4. 1 Quebec judge in assent	65 (.28)	14 (.28)	5 (.26)	11 (.42)	19 (.25)	2 (.23)	2 (.25)	118 (.28)
5. 2 Quebec judges in assent, but non-Quebec judges $\frac{1}{2}$ or more of majority	120 (.51)	25 (.50)	7 (.37)	12 (.46)	47 (.62)	3 (.33)	3 (.375)	217 (.51)
6. 2 Quebec judges in assent and more than $\frac{1}{2}$ of majority	6 (.03)	2 (.04)	1 (.05)	0	2 (.02)	0	0	11 (.03)
Total	236 (1.00)	50 (1.00)	19 (1.00)	26 (1.00)	76 (1.00)	9 (1.00)	8 (1.00)	424 (1.00)

Table IV.30  
Quebec judges' participation in Quebec appeals-Period III (1919-49)

Quebec judges' participation	Type of law							
	a Civil Code	b Quebec statute	c Quebec statute & Civil Code	d Federal statute & Quebec law	e Federal statute	f Criminal	g Constitu- tional	h Other Total
1. No Quebec judges	0	0	0	0	0	0	0	0
2. Quebec judges (1 or 2)-in dissent	4 (.02)	1 (.02)	1 (.02)	1 (.04)	1 (.02)	1 (.025)	0	9 (.02)
3. Quebec judges split	10 (.05)	4 (.07)	8 (.16)	1 (.04)	4 (.07)	1 (.025)	2 (.13)	0 (.07)
4. 1 Quebec judge in assent	38 (.18)	12 (.21)	5 (.10)	5 (.22)	8 (.14)	7 (.17)	3 (.20)	4 (.80)
5. 2 Quebec judges in assent, but non-Quebec judges $\frac{1}{2}$ or more of majority	148 (.72)	35 (.63)	35 (.71)	16 (.70)	43 (.77)	32 (.78)	10 (.67)	0 (.71)
6. 2 Quebec judges in assent and more than $\frac{1}{2}$ of majority	6 (.03)	4 (.07)	0	0	0	0	0	1 (.20)
Total	206 (1.00)	56 (1.00)	49 (1.00)	23 (1.00)	56 (1.00)	41 (1.00)	15 (1.00)	5 (1.00)

11 451  
(.02) (1.00)

Table IV.31  
Quebec judges' participation in Quebec appeals-Period IV (1950-64)

Quebec judges' participation	Type of law								
	a Civil Code	b Quebec statute	c Quebec statute & Civil Code	d Federal statute & Quebec law	e Federal statute	f Criminal	g Constitutional	h Other	Total
1. No Quebec judges	1 (.01)	0	0	0	0	0	0	0	1 (.00)
2. Quebec judges (1, 2 or 3)—unanimous in dissent	4 (.03)	0	1 (.05)	0	1 (.14)	1 (.03)	2 (.40)	0	9 (.04)
3. Quebec judges split, non-Quebec judges constitute $\frac{1}{2}$ or more of majority	9 (.06)	1 (.08)	3 (.15)	0	0	3 (.09)	1 (.20)	0	17 (.07)
4. Quebec judges unanimous in assent, but non-Quebec judges constitute $\frac{1}{2}$ or more of majority	22 (.13)	1 (.08)	4 (.20)	2 (.18)	1 (.14)	12 (.38)	2 (.40)	1 (.50)	45 (.18)



Table IV.31 (cont'd)

Quebec judges' participation	Type of law								
	a Civil Code	b Quebec statute	c Quebec statute & Civil Code	d Federal statute & Quebec law	e Federal statute	f Criminal	g Constitutional	h Other	Total
5. Quebec judges split and constitute more than $\frac{1}{2}$ of majority	4 (.03)	1 (.08)	1 (.05)	0	0	1 (.03)	0	0	7 (.03)
6. Quebec judges unanimous in assent, and constitute more than $\frac{1}{2}$ majority	117 (.75)	9 (.75)	11 (.55)	9 (.82)	5 (.71)	15 (.47)	0	1 (.50)	167 (.68)
Total	157 (1.00)	12 (1.00)	20 (1.00)	11 (1.00)	7 (1.00)	32 (1.00)	5 (1.00)	2 (1.00)	246 (1.00)

legal categories in so far as the participation of Quebec members of the Supreme Court is concerned. The relative voting patterns of the Quebec and non-Quebec judges have shown little variation across the various classifications of law. Stated negatively this suggests that on the whole the non-Quebec judges have not shown any marked reluctance to disagree with their civilian colleagues in those appeals which are exclusively concerned with legal questions appertaining to Quebec's distinctive legal system. If we look at the figures in the second row of each table marking the cases in which the Quebec judges on each case have all been defeated, we can see that this situation has occurred with about the same frequency in appeals confined to provincial law matters (columns a to c) as it has in those which involve some federal legal issue. On the other hand, the figures in rows 3 and 4 of the pre-1949 tables indicate that the Quebec judges have not shown either more coherence or a greater tendency to participate in Civil Code cases or those involving other facets of Quebec's legal system.

The main point of contrast which these tables reveal is between different periods. Of course, the most marked contrast is between the three pre-1949 periods together and the post-1949 period. As we have previously noted, simply by virtue of increasing Quebec's representation from two out of seven to three out of nine judges, the *potential* capacity of the Quebec judges to dominate the Court in Quebec appeals, especially when the Court sat as a five-judge court, was greatly expanded. Table IV.31 when set beside the tables for the three divisions of the earlier period shows how this potential power was converted into real *numerical* predominance. Prior to the expansion of the Court, there was only one rather rare voting pattern which could make the Quebec members of the Court the largest element in the Court's majority on a Quebec appeal: that was when, with five judges sitting for a case, the two Quebec judges were joined in a split decision by one of their common-law colleagues. This situation occurred only about three times in every 100 appeals. However, after 1949, the preponderance of the Quebec justices on the majority side of the Court became the normal rather than the exceptional situation in Quebec appeals. If in Table IV.31 we add together the cases in which the Quebec judges split but still retained control of the majority (row 5) with those in which they were unanimous and constituted more than half of the majority (row 6), we can see that this accounts for 71 per cent of all Quebec appeals. Moreover if we confine our attention to appeals involving only Quebec law (columns a to c) we can see that in over three-quarters of these cases the Quebec judges were the predominant element in the majority. We should note that in cases involving constitutional law where nine or seven judges usually sit, the Quebec judges cannot enjoy the same numerical superiority. To a somewhat lesser extent this is also true of criminal cases.

But besides this expected difference between the pre- and post-1949 epochs, there is also a significant difference between Periods I (1877-95) and II (1896-1918) on the one hand, and Period III (1919-49)

on the other. In the latter period the figures suggest that the Quebec judges were more cohesive, more persuasive and more active participants in Quebec appeals than their counterparts had been in the Court's earlier years. A significantly larger proportion of cases during Period III found both Quebec judges in the majority. Conversely, we can observe that the proportions of cases in which the Quebec judges were unanimously defeated (row 2), in which they split their votes (row 3), and in which only one Quebec judge took part on the majority side (row 4), all diminished.<sup>43</sup> Perhaps the most obvious explanation of this increase in the relative influence of the Quebec members of the Court in Quebec appeals is to be sought in terms of the superior quality of Quebec appointments to the Supreme Court bench during this period. Jurists of the calibre of Rinfret and Mignault were more likely to command the respect of their common-law colleagues on the bench. Perhaps they were more responsible in accepting their duty to direct the Court's civil-law adjudication than were some of the earlier Quebec appointees, whose appointments would appear to have depended more on their political connections than on their professional achievements.

It is instructive to relate the divisions within the Supreme Court in Quebec appeals to the Supreme Court's relationship with the Quebec courts. As might be expected, we find that in those decisions in which Quebec members of the Supreme Court were defeated there was a marked tendency for the highest court of last resort in Quebec to be reversed by the Supreme Court.

Table IV.32

Role of Quebec judges in Quebec appeals concerning the Civil Code 1877-1964

Participation of Quebec judges	Disposition of appeal by Supreme Court			Totals
	Quebec court affirmed	Quebec court reversed or varied	Case decided on jurisdictional grounds	
No Quebec judges on case	0	1 (.50)	1 (.50)	2 (1.00)
Quebec judge or judges defeated by non-Quebec judges	8 (.36)	14 (.64)	0	22 (1.00)
Quebec judges split	39 (.44)	49 (.56)	0	88 (1.00)
Quebec judges all participate in majority	405 (.65)	209 (.34)	6 (.01)	620 (1.00)
Total	452 (.62)	273 (.37)	7 (.01)	732 (1.00)

In Table IV.32 for those appeals dealing mainly with aspects of Quebec's Civil Code we have cross-tabulated the role played by Quebec Supreme Court judges with the Court's disposition of the Quebec appeal. Here there is an obvious contrast between the cases in which Quebec judges have dissented and those in which they have been on the majority side of the Supreme Court. The contrast is particularly marked in those 22 cases in which the Quebec members of the Supreme Court were all on the dissenting side. In 64 per cent of these, the Supreme Court altered the decision reached by the lower Quebec court, whereas in those cases which found the civilian judges all in the majority only 34 per cent involved reversals or variations of the Quebec court's decision. In the third row of cases, where the Quebec judges split and the non-Quebec judges together with one or two Quebec judges prevailed against the opinion of at least one Quebec judge, the frequency with which the Supreme Court reversed or varied the Quebec court of last resort declines somewhat. However even here the difference between the rate of reversal in these cases and the frequency of reversals in those cases where all the Quebec judges sitting for the case participated in the majority is significant at the one per cent level.

These differences indicate that more often than not, when in Quebec appeals concerning the Civil Code the Supreme Court has been divided and all or some of its civilian jurists have dissented, the Court's predominantly non-Quebec majority has upset the judgment of the majority of judges on Quebec's highest court of last resort. This tendency might strengthen the suspicions of those who have joined in the classical Quebec protest against the Supreme Court's review of Quebec civil-law decisions. It should be noted, however, that we have not traced these appeals back to the Quebec courts to see whether there were divisions among the judges who heard the case in Quebec paralleling the divisions on the Supreme Court. It may be that what we have called the "common-law" majority on the Supreme Court in many of these cases have treated a Civil Code issue in the same way as did a Quebec judge at the trial level or a minority of the civilian judges on the Quebec appeal court.<sup>44</sup> While this may be no comfort to the Supreme Court's civilian critic who insists that the opinion of the majority of civilian jurists at the appellate level in Quebec should prevail against that of the "common-law" majority on the Supreme Court, still it might make it more difficult for such critics to assume that the position taken by the non-Quebec judges in these Supreme Court divisions necessarily entails an alien or common-law approach to Quebec's legal system.

One other facet of the Supreme Court's treatment of Quebec appeals which might cast some light on the roles which the Quebec and non-Quebec judges have played in adjudicating Quebec legal issues is the distribution of opinion-writing responsibilities among the members of the Supreme Court's bench. When we examine the Supreme Court's decisions to see which judges actually wrote opinions, we may find, for instance, that the numerical inferiority of the Court's Quebec wing which, as we have seen, was a marked feature of the Court's record



in the pre-1949 era, may have been partially offset by a tendency for the Quebec judges to write the opinion of the Court whenever they were members of the majority.

For our examination of opinion-writing we have divided the Court's reported decisions in Quebec appeal cases into those in which there was only one opinion written for the majority and those in which two or more members of the majority wrote opinions of their own. We have further sub-divided the first group of cases into those in which the single opinion of the Court's majority was written by a non-Quebec judge. Thus we have distinguished three possible opinion-writing arrangements: 1) cases in which a Quebec judge wrote the Court's opinion; 2) cases in which a non-Quebec judge wrote the Court's opinion; 3) cases in which several opinions were written for the majority side (including instances in which several Quebec judges wrote majority judgments).

Table IV.33 applies these three categories to all Quebec appeals in each of the four periods into which we have divided the Supreme Court's appellate experience. These periods are the same as those used above in Tables IV.28 to IV.31. It should be noted that the Quebec judges' participation in opinion-writing has been disproportionately large when compared with their numerical involvement in Quebec appeal cases. While the Quebec members of the Court constituted more than half of the Court's majority in less than 3 per cent of Quebec appeals prior to 1949, they were exclusively responsible for writing the judgment of the Court's majority in 37 per cent of the Court's Quebec appeals prior to 1949. Further, the incidence of Quebec leadership in opinion-writing has risen from 28 per cent in the first period to 41 per cent in the third pre-1949 period. The jump to 64 per cent in the modern period would in large measure be a consequence of increasing from two to three the number of Quebec judges available for hearing Quebec appeals.

In Table IV.34 we have cross-tabulated the three alternative opinion-writing situations with the various legal categories for all of the Supreme Court's reported decisions in Quebec appeals. If we treat the cases tabulated in columns a to c as representing cases confined to Quebec legal issues, and columns d to h as representing those entailing federal concerns, we find that the frequency of cases in which a Quebec judge wrote the Court's opinion is significantly larger in the former group of cases than in the latter. In 45 per cent of the former cases the Court's opinion was written by a Quebec judge, whereas in only 33 per cent of the latter group was this the case. On the other hand, the proportion of cases in which non-Quebec members of the Court were responsible for the single opinion of the Court is markedly higher in those three classes of appeals—federal statutory law, criminal law, and constitutional law—raising legal issues which went beyond purely provincial concerns. The figures in column g reveal an abnormally high propensity for the Court's majority to produce a plurality of opinions in constitutional law cases. This would appear to be mainly at the expense of single opinions written by Quebec judges, the number of non-Quebec single opinions being higher than in most other categories.

Table IV.33

Distribution of opinion-writing in Quebec appeals by periods

Opinion-writing	Period I (1877-95)	Period II (1896-1918)	Period III (1919-49)	Period IV (1950-64)	Total
Quebec judge wrote opinion of the Court	75 (.28)	163 (.38)	187 (.41)	158 (.64)	583 (.42)
Non-Quebec judge wrote opinion of the Court	60 (.22)	89 (.21)	85 (.19)	36 (.15)	270 (.19)
Two or more opinions written for majority	136 (.50)	172 (.41)	179 (.40)	52 (.21)	539 (.39)
Total	271 (1.00)	424 (1.00)	451 (1.00)	246 (1.00)	1392 (1.00)

This analysis of opinion-writing should moderate the conclusions which might be derived from our examination of the numerical weight of Quebec judges' participation in voting in Quebec appeals. That study clearly demonstrated that prior to 1949 the occasions upon which the civilian members of the bench were quantitatively the dominant element in the Court's majority were very rare indeed. However, this numerical inferiority was partially compensated for by the frequency with which Quebec members of the Court, particularly in appeals exclusively concerned with Quebec's distinctive legal system, wrote the opinion of the Court whenever they were part of the Court's majority.

Still this will be no consolation to the civilian critic of the Supreme Court who takes the view that any amount of influence over Quebec's civil-law system by jurists who have not been formally trained in that system is objectionable. Such critics as these will be far less impressed by the fact that the Quebec minority on the Court have been approximately twice as active as the common-law majority in writing the opinion of the Court in Quebec appeals, than by the fact that, despite this contrast, non-Quebec judges have written the single opinion of the Court in roughly one out of every five Quebec appeal cases. Further, they will note that despite the addition to the Court's bench of a third Quebec judge in 1949, the proportion of cases in which the non-civilian wrote the Court's opinion in Quebec cases was still 15 per cent.

When we add to this the evidence of a positive correlation between those occasions upon which Quebec members of the Supreme Court have been defeated by the non-Quebec majority and those upon which the Supreme Court majority has upset the decision of Quebec's highest provincial appeal court, it is impossible to deny the influence which

Table IV.34  
Distribution of opinion-writing in Quebec appeals by legal category

Opinion-writing	a Civil Code	b Quebec statute	c Civil Code & Quebec statute	d Federal statute & Quebec law	e Federal statute	f Criminal	g Constitu- tional	h Other	Total
Quebec judge wrote opinion of the Court	351 (.48)	52 (.34)	43 (.43)	34 (.48)	70 (.35)	27 (.30)	4 (.10)	2 (.28)	583 (.42)
Non-Quebec judge wrote opinion of the Court	114 (.16)	29 (.19)	12 (.12)	13 (.18)	58 (.29)	30 (.34)	12 (.30)	2 (.28)	270 (.19)
Two or more opinions written for the majority	267 (.36)	70 (.46)	45 (.45)	24 (.34)	74 (.37)	32 (.36)	24 (.60)	3 (.43)	539 (.39)
Total	732 (1.00)	151 (1.00)	100 (1.00)	71 (1.00)	202 (1.00)	89 (1.00)	40 (1.00)	7 (1.00)	1392 (1.00)

the so-called "common-law" members of the Supreme Court have had on the adjudication of Quebec law-suits, including those which have turned essentially on the interpretation of the Civil Code. The evidence presented here shows that the potential control over the adjudication of Quebec legal controversies bestowed by the Supreme Court's organization on the non-Quebec majority of that Court has on many occasions been converted into actual power and used to defeat the judicial reasoning of both the Quebec members of the Supreme Court and the senior jurists of the Quebec Court of Queen's Bench.

Finally we should note that the civilian critic of the Supreme Court would not likely be satisfied even if the non-Quebec judges came to play a more passive role in Quebec appeals. He would surely see little point in permitting non-Quebec judges to take part in Quebec cases dealing with civil law matters if these judges were simply to be dead weight, rubber-stamping the judgment of two or three civilian judges. In effect this would mean that instead of common-law judges being instrumental in reversing the judgments of the senior Quebec courts, a pair of civilian judges (or at most three civilian judges) on the Supreme Court of Canada would be given the power to reverse decisions reached by a larger number of judges on the Quebec court of last resort. In addition to the peculiar arithmetic of this arrangement, what is likely to compound its inherent injustice in the eyes of many Quebec civilians is that not many of Quebec's jurists are likely to rate the Supreme Court civilians' grasp of Quebec civil law as superior for instance to that of the members of Quebec's Court of Queen's Bench. Indeed, over the years, a considerable number of Quebecers—many of them respected lawyers—have made exactly the reverse evaluation.<sup>45</sup>

No amount of statistical evidence can demonstrate whether the influence which non-Quebec judges have had on the development of Quebec law or on the rights and interests of Quebec litigants has been a beneficial or detrimental force. As we argued in Chapter II, a pragmatic test of the consequences of the common-law influence on the Quebec legal system would require a careful examination of the actual skills of the common-law judges in adjudicating civil-law issues, as well, of course, as a painstaking inquiry into the actual effects of individual decisions or series of decisions on both the immediate interests of the parties to Supreme Court appeals and the long-run evolution of Quebec's legal culture. If, however, this pragmatic approach is eschewed for a more ideological one based on a belief in the intrinsic merits of judicial nationalism, the evidence presented in this section can be used as grounds for arguing that the judicial organization of this country ought to be changed so that Quebec's distinctive legal system is subject to interpretation solely by those judges nurtured in that system. And, lest this principle of judicial nationalism be too lightly dismissed by those who are not apt to share it *in this context*, it is worth recalling the extent to which common-law Canadian jurists, especially in the context of constitutional law, invoked a similar principle to justify the transfer of judicial control from the Judicial Committee of the Privy Council to the Supreme Court of Canada.





Throughout our quantitative analysis of the Supreme Court's decisions we warned against any attempt to derive firm conclusions about the determinants of the Court's decision-making from a purely statistical record of its disposition of provincial appeals or a bloc-analysis of its judges' voting patterns. As an approach to providing explanations of why a court decided issues in a particular way quantitative analysis can at most generate new hypotheses or provide evidence (positive or negative) which might strengthen one's reasons for accepting some explanatory theory of a court's decision-making. But the kind of theories which quantitative studies tend to generate or support must be backed up by a careful examination of leading cases in the area of the court's decision-making which the theories purport to explain.

By seeking to identify consistent trends in the outcome of a court's adjudication, quantitative analyses assume that a certain factor or factors (usually extra-legal in nature) may be responsible for the court's judgments in a particular kind of dispute. The main purpose of our own quantitative study has been to ascertain whether a statistical view of the Court's disposition of appeals or the voting of its judges in any group of cases is consistent with an explanation of its decision-making which considers the ethnic background of the judges—i.e. whether the judge is an English- or French-speaking Canadian—as a critical causal factor. Even where we did find a positive correlation between the ethnic identity of judges and the judgments arrived at (as indeed we did in at least a hard core of cases touching upon civil liberties questions and what we defined as potential "bicultural issues") we have insisted that, before accepting the bicultural explanations of judicial behaviour indicated by this correlation, we must see whether on the basis of a close reading of the key decisions in these areas, the explicit and implicit grounds of the judges' opinions corroborate a bicultural theory.

We must admit that the very attempt to find cultural values at work in the reasoning of judges implies a particular view of the judicial process. At least negatively our approach implicitly rejects a thorough-going positivist conception of the judge's role: by looking for

some trace of the culturally conditioned attitudes which the judge might bring into his adjudicative work we must assume that adjudication may often involve more than the mechanical application of predetermined rules to particular cases. In eschewing a rigidly positivist interpretation of the judicial process, we commit ourselves to what has traditionally been called the realist or sociological school of thought—at least to the extent that we are willing to entertain the hypothesis that the personal attitudes of judges can account for their arriving at different determinations of the same dispute.<sup>1</sup> By "the personal attitudes" of judges we mean no less than what Mr. Justice Cardozo of the United States Supreme Court attributed to all his fellow practitioners of the judicial art when he wrote

. . . there is in each of us a stream of tendency whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions. . . . In this mental background every problem finds its setting. We may try to see things objectively as we please. None the less, we can never see them with any eyes except our own. . . .<sup>2</sup>

Our inquiry postulates that in certain kinds of controversy adjudicated by the Supreme Court one of the decisive ingredients of what Justice Cardozo calls the "mental background" of the judges may be social values or outlooks which can be associated with one of Canada's two major cultural groups.

And yet we should note that our commitment to the realist-sociological viewpoint need not be simple and unqualified. To seek to identify the points in the adjudicative process at which the judge has acted as the transmitter of social values not exclusively derived from objective legal rules need not imply that judges make decisions as autonomous legislators in an arena of unprincipled discretion.<sup>3</sup> As Justice Cardozo remarked in a later passage from the same work from which we have already quoted, a judge "is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in social life.'"<sup>4</sup> To ignore the judge's understanding of his own function as that of authoritatively settling disputes in a like manner to similar past disputes, and to ignore the way in which that conception fetters the free exercise of his own private views, would be impertinent and, what is worse, erroneous. Indeed, for the contemporary student of the judicial process the poles of rigid positivism and unmitigated sociological realism are surely unreasonable alternatives. On the premise that rule and discretion are interwoven components of the adjudicative process, our effort there is directed at finding at what point a

difference in the choices that judges make among competing legal principles or precedents or between different applications of the same legal rules is influenced by a divergence in personal values stemming from a difference in ethnic backgrounds.

There can be no denying that it is far more difficult to apply this kind of investigation to the decisions of the Canadian Supreme Court than to those, for instance, of the United States Supreme Court. Traditionally the jurists who have manned the Supreme Court of Canada have conceived of their function in terms of the positivist image.<sup>5</sup> The intellectual force of the American realist school of jurisprudence, coupled with the practical implication of the Court's new responsibilities as the final arbiter of Canadian legal disputes including those which raise new and enormously important questions concerning the legality of public policy, may have forced upon the Supreme Court judges a larger awareness of the Court's unavoidable role "as a community policy-maker."<sup>6</sup> But this has rarely resulted in a noticeably more candid acknowledgement of personal values or philosophies by Supreme Court judges in the reasoning with which they have supported their opinions.<sup>7</sup> Consequently our analysis of some judgments will necessarily take the form of trying to unmask value-judgments which may be expressed in terms of dispassionate legal reasoning. To the unrelenting positivist such an approach will be regarded as misguided. But it is our contention that if this kind of analysis is carried out with intellectual honesty and sensitivity it can strengthen that knowledge of judicial subjectivity which, as a kind of catharsis, can effectively promote judicial rationality.

In selecting the cases for study in this section of our work we have, in the main, followed the categories of bicultural issues used in the quantitative questionnaire.<sup>8</sup> In addition we have examined some of the leading cases in which the issue raised a substantive or procedural question relating to bilingualism. But we have not singled out for separate treatment leading examples of cases in which the division of judicial opinions would appear to be based essentially on a difference between common-law and civil-law precepts or methods of adjudication. We may find, however, that where there is a bicultural division of opinion on a question—for instance, pertaining to family relations or civil liberties—the division can be attributed to the difference between a common-law and a civil-law approach to the problem. But a systematic examination of legal dualism in the Supreme Court's decisions would go far beyond the scope of this study. Such an examination would have to be far more sensitive to manifestations of competing legal values and techniques than our study, which is primarily a political science study, is capable of being. Rather than seeking for evidence of a bicultural clash of opinion in the choice of different legal precedents or techniques of interpretation, we have sought for it primarily in terms of the judges' conceptions of the proper social relationships which the law should uphold.

But in seeking for evidence of a *bicultural* clash of values we must bear in mind the warning stated earlier in Chapter II.<sup>9</sup> We cannot assume that where French-speaking and English-speaking judges have



differed on the basis of some conflict of value-judgments that this necessarily represents a conflict of French Canadian versus English Canadian values. We must look carefully at the contrasting social attitudes and speculate as to how reasonable it is to explain the difference of opinion in terms of the difference in the judges' ethnic background. The same warning is equally applicable to a difference of opinion between Quebec and non-Quebec judges which may be interpreted as resulting from the difference between attitudes based on the English common law and those based on Quebec civil law. Such an interpretation may too readily assume two propositions: 1) that there is one typically common-law or one typically civilian approach to a legal issue, and 2) that these typical approaches are in fact embodied in the opinions of the Supreme Court judges.

In our study of the Supreme Court's important recent decisions affecting bicultural and bilingual issues we are interested not only in identifying bicultural divisions of opinions on the Court's bench but also in the manner in which the Court has negotiated or adjudicated these questions which may potentially affect French-English relations. Indeed, in several categories of cases we may find that it is the latter interest which is paramount. Where there is no significant division of opinion among the judges the main point of our inquiry will be to report the Court's contribution to the settlement of controversies which might have generated French-English controversies.

#### *A. Cases Raising Questions of Bilingualism*

We have dealt at length with bilingualism in the Court's proceedings in Chapter III, section B, 78-111. Here we wish only to comment on those few cases in which the question of bilingualism as a substantive issue was before the Court. Since 1949 there have been very few such cases and certainly none that divided the Court on ethnic lines.

The only context in which the question of bilingualism as a substantive right was raised was in connection with an accused person's right to have a jury composed of persons whose primary language is that of the accused. *Piperno v. The Queen* [1953] 2 S.C.R. 292 brought this question before the Supreme Court for the first time in the form of an accused person's demand to be tried in Quebec by a completely English-speaking jury. Section 923(2) of the Criminal Code grants the accused a right to demand a jury composed entirely of English-speaking persons or composed entirely of French-speaking persons. But in this case the Supreme Court, with Justice Fauteux writing the opinion of the Court,<sup>10</sup> supported the majority of the Quebec Court of Queen's Bench and ruled that the right of the accused to an English- or French-speaking jury is not an absolute right. Following the jurisprudence worked out in a number of Quebec decisions, Justice Fauteux held that the condition attached by section 924 of the Criminal Code to the right of the accused in Manitoba to trial by French- or English-speaking jurors, namely that the accused could only ask to be judged by jurors familiar with the language spoken by the accused,

also applied to the accused in Quebec. In this particular case, the accused, although of Italian extraction, was fluent in both French and English so that the right to a jury skilled exclusively in French or English had no application to him for, to quote Justice Fauteux, "Whether one, several or even 12 jurors are skilled in the French or English language, or in both, in any case the body of the jury is skilled in a language familiar to the accused."<sup>11</sup>

In the matter of a *Reference Re Regina v. Coffin* [1956] S.C.R. 191, the Court's majority once again displayed a practical concern with setting some reasonable limitation on the right of the accused to be tried by 12 jurymen of his own language. The limitation invoked here was derived from the third subsection of Section 923 of the Criminal Code, which states that the accused's demand for a trial by 12 English-speaking or 12 French-speaking jurors would be granted by the judge unless in the judge's opinion "the ends of justice" would be better served by having a mixed jury. The majority<sup>12</sup> agreed that the trial judge had properly exercised the discretion bestowed on him by section 923(3) when he denied Coffin's request for a completely English-speaking jury on the grounds that to grant such a request would have meant eliminating 85 to 88 per cent of the local population as eligible jurors.

Justice Cartwright, however, supported by Justice Locke, disagreed with this reasoning. In Justice Cartwright's view the trial judge had erred in basing the exercise of his discretionary power to deny the accused's request for an English-speaking jury on the grounds that by granting the request he would be disqualifying the bulk of the local population for eligibility for jury duty. Justice Cartwright argued that this consideration was not relevant to the question of whether the ends of justice would be best served by empanelling a mixed jury rather than one composed entirely of jurors speaking the language of the accused. What we should note here is that the disagreement between the Court's majority and Justices Cartwright and Locke stemmed primarily from their divergent assessments of the prime values to be upheld in the administration of the criminal law. Justice Cartwright, true to his rights-of-the-individual philosophy, denied that the practical difficulty involved in raising a completely English-speaking jury in a predominantly French-speaking region had anything to do with serving the "ends of justice." He insisted that this consideration could not justify depriving the accused of his right to be tried by jurymen who spoke his own language. But the majority clearly gave a higher priority to avoiding an extreme inconvenience in making the arrangements for the trial than to the defendant's interest in being tried by jurors familiar with his own language. Justice Taschereau explicitly acknowledged this evaluation of the interests involved in this issue when he prefaced his agreement with the trial judge's reasoning with the following statement: "In spite of the fact that in any criminal trial, the interest of the accused should be primary, the interest of society must not be disregarded."<sup>13</sup>

This difference in the value-judgments of the two sides of the Court cannot be accounted for in terms of the judges' ethnic backgrounds. Not only is there the fact that Justices Taschereau and Fauteux were joined on the majority side by Chief Justice Kerwin and Justices Kellock and Rand, but also it is clear that Justice Cartwright's defence of Coffin's right to an English-speaking jury was not based on a particular concern to defend the rights of English-speaking persons in French-speaking regions of Quebec. The difference of opinion which we have identified turns basically on divergent evaluations of the interests involved in the administration of the criminal law. It would seem most likely that this difference of opinion crosses ethnic lines both on and off the bench. However, it is interesting to observe the outcome of this difference when applied to the question of the right of the accused to 12 jurymen of his own language: the Supreme Court majority, supported by both of the Court's French-speaking members and in line with the main tenor of judicial opinion within the Quebec judiciary, was willing to curtail the defendant's right to determine the language of his jury if it was necessary to safeguard society's interest in the expeditious conduct of a criminal trial.

The *Coffin* case raised a second question involving the use of French and English in a criminal trial. Coffin's trial took place before a mixed jury so that the trial judge saw fit to charge the jury in both languages, and furthermore one counsel for the prosecution as well as one for the defence addressed the jury in one language while each of his associates addressed the jury in the other language. One of the grounds of Coffin's request for a new trial was the contention that the differences between the addresses in the two languages meant in effect that the defendant was tried by two groups of jurymen composed of six men each. The Supreme Court without a dissenting opinion<sup>14</sup> rejected this argument. Both Justices Taschereau and Kellock reasoned that with a mixed jury it was perfectly logical to have the judge and counsel for both sides address the jury in French and English. Also, earlier Supreme Court judgments were found to provide some authority for the proposition that with a mixed jury at least the evidence and the judge's address to the jury should be translated into both languages.<sup>15</sup> However, Justice Kellock concluded his judgment with the following statement: "In my opinion, neither the differences to which we were referred as between the address on behalf of the prosecution in the one language and the other, nor the charges, were of a nature to call for the interference of this Court in the grant of a new trial" (*Reference Re Regina v. Coffin* [1956] S.C.R. 215). The inference to be drawn from these words would seem to be that if in the Court's view there was a significant difference between the judge's charge or counsel's addresses in one language and their counterparts' in the other language, it might consider this grounds for ordering a new trial.

Besides this treatment of bilingualism as a substantive issue in criminal appeals, bilingualism was employed by the Court as a positive instrument of interpretation. On a number of occasions judges consulted the French or English versions of a document in order to



resolve ambiguities or doubts in interpreting it. This interpretative technique was most apt for interpreting federal and Quebec statutes which are printed in both languages. Here the Court's policy of insisting that both the French and English versions of a statute must be read together has assisted judges in firmly elucidating the meaning of statutory provisions. In *Industrial Acceptance Corp. v. Couture* [1954] S.C.R. 34, for example, Justice Estey consulted the French version of a Quebec statute in order to establish that the word "may" in the English version was to be taken as an imperative. And again in *More v. The Queen* [1963] S.C.R. 522, Justice Fauteux, in working out the proper meaning to attach to the word "deliberate" in section 202A(2)(a) of the Criminal Code appertaining to capital murder, compared the French and English phrases and their respective dictionary definitions. Nor has the Court confined the application of this technique to Quebec and federal statutes. In *Bellavance v. Orange Crush Limited* [1955] S.C.R. 706, Justice Rand used this French-English comparative technique of interpretation to clarify the meaning of a commercial contract.

Many other examples of the Supreme Court's use of bilingualism in interpreting statutes and other documents could be cited.<sup>16</sup> Suffice it to say that this would appear to be an area in which the bilingual and bicultural nature of the Court's work instead of raising problems increases the Court's capacity for effectively performing its duties.

### B. Family Relations Cases

It is reasonable to regard cases which raise important questions involving family relationships as a potential source of ethnic or perhaps ethnic-religious divisions on the Supreme Court bench. Certainly a number of cases which came before the Court in the post-1949 period posed such questions and a fair proportion of these produced a division of opinion on the Supreme Court bench. But very few of these divisions are susceptible to a bicultural explanation. As we have already seen in our quantitative analysis of judicial voting in bicultural issue cases, most of the split decisions which have found the French Canadian judges forming the nucleus of a dissenting bloc have been in the field of civil liberties. Cases involving bicultural issues other than civil liberties accounted for relatively few of these divisions.<sup>17</sup> Even in the latter part of the post-1949 period when six cases involving some aspect of family relations lead to a split decision, not one of these cases produced a dissent by either of the Court's French Canadian judges.<sup>18</sup>

Indeed it is worth noting the relatively high degree of ethnic agreement on such issues as divorce and matrimonial offences. Quebec judges participating in cases dealing with matrimonial offences have, on the whole, silently concurred with their common-law, English-speaking colleagues. *Smith v. Smith* [1952] 2 S.C.R. 312 is representative. The issue in this case was whether the burden of proof of adultery was simply the "balance of probabilities" or the more onerous



one of "beyond a reasonable doubt." A unanimous Court including Chief Justice Rinfret and Justices Fauteux and Taschereau opted for the less demanding test and concluded that the burden of proof was no different than in any other civil case, namely, on the "balance of probabilities."

But a few cases raising questions of family relations have given some evidence of a bicultural division of the Court. One such area is that pertaining to property in a marriage context. Here the difference of opinion between French Canadian civilian judges and English-speaking common-law judges, in so far as it has anything to do with ethnic background, would appear to turn primarily on the question of whether Quebec and French authorities or English authorities should be followed in deciding how to adapt a federal statute to local conditions in Quebec. For example in a case reported late in 1949, *Minister of National Revenue v. The Royal Trust Co.* [1949] S.C.R. 727, the Court had to decide how to apply the terms of the *Dominion Succession Duty Act* to a debt owed to a widow under a marriage contract executed in Quebec. Under the contract in question the husband had obligated himself during the existence of his marriage to pay his wife \$20,000 in consideration of her renunciation of community and dower. This sum remained unpaid at the time of the husband's death in 1943. His executors claimed a deduction of this amount from the value of his estate for the purpose of the federal succession duty. The *Succession Duty Act* in Section 8(2)(a) exempted only those debts "created bona fide for full consideration in money or money's worth." One of the central questions was whether or not \$20,000 owing to the wife under the marriage contract constituted such a debt. Justice Taschereau, with Chief Justice Rinfret concurring, dealt with this question by consulting Quebec and French authorities on agreements made in marriage contracts and concluded that, since the agreement entered into was "bilateral and onerous" and lacked the element of "gratuitousness," the money involved was not a gift but a real debt and should be deducted from the value of the estate. In contrast to this, Justice Kerwin followed English decisions interpreting the *British Succession Duty Act* which held that money payable under a marriage contract is, upon death, subject to succession duty since the contract was not made for valuable consideration in money or money's worth. It is interesting to note that on this occasion the decisive votes were cast by Justices Rand and Estey who agreed with the two Quebec judges on the disposition of the appeal. However, Justice Rand who wrote the opinion for this pair of justices reached his conclusion by a different route from that followed by the two civilian judges. Still he warned against the use of English authorities when dealing with the application of a federal statute and concluded that the conflicting interpretations to which this phase of the federal statute was subject strengthened the executors' case, for a taxing statute must make reasonably clear the intention to impose a tax.

In one other case involving the application of a federal taxing statute to a marital situation in Quebec, there was some expression

of civilian concern about the possible encroachment of alien authorities into the interpretation of Quebec's civil law. This was in *Sura v. Minister of National Revenue* [1962] S.C.R. 65, where the question was whether income made up of a husband's salary and rentals but held in community by husband and wife could, for purposes of the federal income tax, be considered as belonging one-half to the husband and one-half to the wife. Justice Taschereau writing for a unanimous court rejected this use of the community of property concept to soften the burden of the federal income tax. The interesting point in his judgment is his repudiation of authorities from the eight states of the United States which have established legal community. He supported this rejection of American precedents by referring to the writings of some Louisiana jurists which emphasized the extent to which judicial construction had imported common-law precepts into Louisiana's civil law. In Justice Taschereau's view this adulteration of the Louisiana civil law has rendered precedents based upon it of doubtful value to the Canadian Supreme Court in interpreting Quebec's civil law.

But if this suggests some degree of civilian suspicion of possible common-law encroachments in those aspects of Quebec's civil law pertaining to the institution of marriage, another case, *Duchesneau v. Cook* [1955] S.C.R. 207, points to a convergence of common-law and civil-law approaches in this area. This Quebec appeal involved the capacity of a married woman who was separate as to property to dispose freely of her moveables. Justices Fauteux and Taschereau wrote opinions for a unanimous Court and refused to give any wider interpretation of the civil capacity of a woman separate as to property than that specifically authorized by recent amendments to the Civil Code. In taking this position Justice Fauteux followed the common-law principle that the legislature is not presumed to make substantial and radical changes to the law. While on the basis of this precept the civilian judges held that married women separate as to property had not been entirely released from the rule of relative incapacity affecting married women generally in the province of Quebec. Still, they adopted an approach similar to the common-law doctrine of "tracing" to establish the married woman's right to dispose of her property: where the married woman had paid for the property out of her own savings, insurance monies received from moveables destroyed by fire and money borrowed from her father, she was considered to have the capacity to dispose of such property without the authorization of her husband.

This treatment of the issue closely corresponds to the recent development of the common-law position regarding a wife's interest in the matrimonial home. In *Thompson v. Thompson* [1961] S.C.R. 3, a majority of the Supreme Court's common-law judges led by Justice Judson incorporated some of the post-war English jurisprudence regarding ownership of the matrimonial home. Here again the question of the wife's proprietary rights turned on the fact of the financial contribution by the wife in the purchase of the home. Whether the civilians in *Duchesneau v. Cook* were influenced by the developing

common-law doctrine in England, or whether *Duchesneau v. Cook* influenced the common-law lawyers in *Thompson v. Thompson* is open to speculation. However, the similarity of development in the treatment of somewhat parallel legal issues in the two traditions suggests that "common-law" and "civil-law" modes of reasoning, at least as represented on the Supreme Court, may have more in common than popular discussion of their divergencies may sometimes imply.<sup>19</sup>

The custody of children is the one dimension of family law which involved a fairly obvious clash of social values among the Supreme Court judges. There seems to have been no difference on the general principles of law to be followed by an appellate court in custody cases. The Court, without dissent, has accepted the rule that the general welfare of the child is the paramount factor and that the opinion of the trial judge who has had the advantage of observing the parties should not be readily upset by appellate courts. Thus in *Bickley v. Bickley* [1957] S.C.R. 329, an appeal from British Columbia, the Court, constituted by Justice Fauteux and four non-Quebec justices, unanimously held that since it was impossible to determine that the trial judge had not made full judicial use of the opportunity given him of seeing and hearing the parties and, since he had not misdirected himself on any question, the trial judge's decision should be restored. Similarly in a Quebec appeal involving Article 214 of the Quebec Civil Code, *Rochon v. Castonguay* [1961] S.C.R. 359, a unanimous Court, made up of the three Quebec judges,<sup>20</sup> accepted the decision of the court below that it was in the child's best interest to be left in the custody of the father rather than the mother.

But two other cases in this general area did divide the Court on issues which went beyond these legal precepts, although it is questionable to what extent the division can be traced to the ethnic backgrounds of the judges. This is particularly questionable in the first case, *McKee v. McKee* [1950] S.C.R. 700. In this case the California Court of Appeal had granted the parties a divorce and had assigned custody of the couple's one child to the appellant mother. But before the final decision was handed down the respondent father took the child to the province of Ontario where he took up residence on a farm near Kitchener. The mother then brought an action for custody in the Ontario courts. A writ of habeas corpus was issued and heard before Mr. Justice Smiley who directed the issue of custody to be heard in a separate proceeding. The result of the second hearing was that it would be in the best interests of the infant to grant custody to the father. The issue argued before the Court of Appeal of Ontario was that the California court having jurisdiction, the Ontario courts had no right to hear the custody question *de novo*.

The majority of the Supreme Court of Canada, Justices Cartwright, Kerwin, Estey and Locke, held that the trial judge had erred in granting custody to the father. The minority, with Justice Kellock writing the dissenting opinion and Justices Taschereau and Fauteux concurring, disagreed, above all, on the grounds that the courts of Ontario had an overriding duty as *parens patriae* to concern themselves with the character of the parents in the interests of the child.



Justice Kellock placed great stress on evidence contained in the Ontario trial judge's decision to the effect that the mother's behaviour displayed "a looseness of public conduct and a lack of personal integrity and dignity which I think might provide a very unhappy background to the proper upbringing of the child" (at 103). In the minority's view this evidence justified the trial judge in reaching his decision that it would be in the best interests of the child to be brought up by the father. But the majority was less concerned with the Court's role as *parens patriae*. In its eyes the mother's apparent lesser qualification as a parent did not constitute as serious a consideration as the father's moving from California to Ontario in order to avoid the law of the jurisdiction to which he had submitted. Although there was no disagreement on the proposition that the judgment of a foreign court as to the custody of an infant was not binding, nevertheless the majority position manifested more concern for the preservation of comity between the courts of friendly jurisdictions than for securing the most beneficial domestic circumstances for the offspring of divorced parents. However, the fact that Justice Kellock wrote the dissenting judgment would qualify any attempt to explain the contrasting concern of Justices Fauteux and Taschereau for the family situation in terms of French Canadian social priorities. Indeed, if we were to try to link the opinions expressed on the minority side in this case with either of Canada's major ethnic divisions it would seem as reasonable to associate the expression of moral opprobrium directed at the mother's behaviour by the trial judge and approvingly quoted by Justice Kellock with a rather conservative Protestant Anglo-Saxon outlook as with French Canadian attitudes.

The other case dealing with the custody of a child which provoked a significant split on the Court—and this time one which pitted three Anglo-Saxon judges against two French Canadian judges—was *Duffin v. Donaldson* [1953] 2 S.C.R. 257. This case touched on the fundamental question of the conditions under which natural parents should be given custody of their children. In three other cases, all Ontario appeals—*Re Baby Duffell* [1950] S.C.R. 731; *Suprenant v. Suprenant* [1951] S.C.R. 806; and *Re Agnes* [1958] S.C.R. 32—the Court had unanimously endorsed the basic principle that, whether a child is legitimate or illegitimate, if the natural parents are of good character and both willing and able to support the child in satisfactory surroundings, they should be entitled to custody of the child notwithstanding that other persons who wish to do so could provide more advantageously for the child's upbringing. But in *Duffin v. Donaldson* [1953] 2 S.C.R. 257, a Quebec appeal involving a similar question of custody, the civilian and common-law judges split, with Justices Kellock, Estey and Cartwright constituting the majority and Justices Taschereau and Fauteux dissenting.

In this case the natural parents had placed a child at the time of its birth with its aunt and uncle and the child had remained in their care for seven years. The child's natural parents lived in the same town as the aunt and uncle, were in constant contact with him and



although they treated him in a friendly fashion, they showed no strong interest in taking their child back nor, aside from one gift of five dollars, did they contribute anything to his support—indeed, they even kept the child's family allowance. However, after seven years a family squabble developed and the natural father brought a writ of habeas corpus for custody of the child. The trial judge dismissed the writ but was reversed by the Quebec Court of Queen's Bench.

At the centre of this dispute was the question of how to apply to this particular situation the general principle enshrined in Article 243 of Quebec's Civil Code that the child remains under the authority of his parents until he comes of age. There were a number of previous decisions by the Quebec courts and the Supreme Court of Canada stipulating the circumstances under which deviations from the authority of natural parents over their children were legitimate. The two groups of Supreme Court justices differed essentially on whether in this particular case the circumstances were such as to justify not following the general prescription of the Quebec Civil Code that children should be brought up in the home of their natural parents.

In analyzing the basic differences which led the two groups of judges to opposite answers to this question, two points stand out. First, there was a difference in the authorities which each side emphasized and secondly a contrast in the moral policies derived from these authorities. The two Quebec judges found the governing formulation for this case in the decisions of Quebec courts,<sup>22</sup> especially the judgment of Mr. Justice Rivard in *Marshall v. Fournelle* Q.R. (1926) 40 K.B. 395, where he said that it was when the parents were "incapables ou indignes" of exercising their parental authority that children could be justifiably placed elsewhere. Since in their view there had been no evidence showing that the child's parents were either incapable or unworthy of acting as parents for the child, they concluded that the child should be returned to his natural parents. Now supporting this approach to the case, in both their own judgments and those judgments which they quoted, was the moral philosophy in which the family is seen as an institution sanctioned by natural law. Justice Taschereau began his judgment by declaring that Article 243 of the Civil Code consecrated "la loi naturelle" and cited the opinion of Mr. Justice Demers of Quebec in *Maquin v. Turgeon* Q.R. (1912) 42 S.C. 232 to the effect that, "The father, or the mother should he default, has the right, according to natural law, to the custody of his child."<sup>23</sup> Neither Justice Taschereau nor Justice Fauteux denied that removing the child from the home in which he had spent all of his seven years and returning him to his natural parents, who admittedly to date had not shown a great deal of affection for him, would subject the child to "certaines désavantages" (Justice Fauteux) which might temporarily have an adverse effect on the child's "confort matériel" (Justice Taschereau), but in their view these rather prudential objections to the transfer of the child were not strong enough to override the natural law prescription for keeping children with their families. Thus they could conclude that "l'intérêt de l'enfant"

was not imperilled as a result of this transfer for they interpreted the child's interests in moral terms according to the precepts of natural law.

But the three Anglo-Saxon judges did not interpret the child's interest in this fashion nor did they base their judgments on the same Quebec authorities. They relied primarily on earlier Supreme Court decisions which put the greatest stress on the interest of the child as the governing criterion in these disputes. These judgments did not stipulate that the parents must be shown to be "incapables ou indignes" of exercising their parental responsibilities before being deprived of a child. Their conclusion that the child's interest required his being left in the home of his aunt and uncle was based above all on the trial judge's feeling that the natural parents had not shown any real affection for the boy. Justice Cartwright was also impressed by the uncontradicted evidence of a doctor who at the trial expressed the opinion that the boy's "removal from the only home he has ever known to that of his parents would cause him grave injury." Clearly to these three judges the child's interest was to be interpreted by a rather utilitarian test rather than by the precepts of natural law.

We have taken some pains to set out the difference between the two sides of the Court in *Taillon v. Donaldson* for this case was perhaps the *cause célèbre* of the post-1949 period for those Quebec jurists who object to the opportunity which the Supreme Court gives to a majority of common-law judges to override the opinion of civil-law judges both in Quebec and on the Supreme Court on questions pertaining to Quebec's Civil Code.<sup>24</sup> However, before accepting the case as a crystal clear instance of a "common-law" view prevailing over the "civilian" treatment of a point in Quebec's civil law, two qualifying points should be made. First, it should be noted that the trial judge with whom the Supreme Court majority agreed was a civilian jurist and although his decision was reversed by the Quebec Court of Queen's Bench his agreement with the three non-Quebec Supreme Court judges at least suggests that their opinions were not *necessarily* the product of their common-law background. Secondly, while it is true that Justices Kellock, Estey and Cartwright did not attach the same weight to the Quebec authorities as did Justices Taschereau and Fauteux, still it would surely be questionable to regard the authorities they did cite as completely alien to the Quebec civil-law tradition. The judgments which they chiefly relied upon were those of Justice Rinfret (as he then was) and Justice Cannon in *Dugal v. Lefebvre* [1934] S.C.R. 501 and Justice Rinfret in *Stevenson v. Florant* [1925] S.C.R. 532.<sup>25</sup> All these judgments were given by civilian jurists—which again might lead one to challenge the assumption that on controversial points of law there are fixed civil-law or common-law positions.

Looking back over the Court's recent decisions in cases raising important questions concerning the family, it would seem appropriate to conclude that bicultural factors have had little if anything to do

with the Court's decision-making. There was some slight evidence of a competition between civil-law and common-law approaches to family law issues in *M.N.R. v. The Royal Trust Company* and in *Taillon v. Donaldson*, and some suggestion of a clash of cultural values in the *McKee* case and, more strongly, in *Taillon v. Donaldson*.

But even in the latter instance, where the two French Canadian judges avowed a natural law concept of the sanctity of the family institution whereas their English Canadian colleagues applied a more prudential test to determine the interests of the child whose future was at stake, is it clear that this represents a *bicultural* division of opinion? The identification of the contrasting moral policies with ethnic culture patterns would seem clearest on the French Canadian side where it is reasonable to associate the natural view of the family with Roman Catholic moral theology. Thus to the extent that French Canadian culture subsumes Catholic moral values, the position adopted by Justices Taschereau and Fauteux as well as by the Quebec jurists whose opinions they cited might be linked to the judges' ethnic background. But the degree to which French Canadian society in Quebec is imbued with the values of a conservative Roman Catholicism is surely diminishing. It may be that the civil law and judicial institutions of French Canada remain relatively firm custodians of Catholic moral values. In that case, what we might be witnessing in disputes like the one under consideration (and others which we will analyze in the civil liberties field) is not only a conflict between French Catholic and more secular utilitarian values on the Supreme Court bench but also, in the case of French Canadian judges, a widening cleavage between values enshrined in Quebec's established legal tradition and changes taking place in the structure of French Canadian society. Under conditions of fairly rapid social change (such as Quebec has been experiencing in recent years) judicial appointees who hold office for life may manifest values which, to an increasing degree, are in tension with changes taking place in their own society.<sup>26</sup>

### *C. Civil Liberties in Quebec*

In the 1950's the Supreme Court of Canada was confronted with a series of Quebec appeals which centred on collisions between Quebec authorities and the claims of private groups or individuals within Quebec to the enjoyment of certain rights and freedoms. In the process of deciding these cases not only did the Court have the immediate responsibility of adjudicating disputes between the popularly elected Quebec government and certain minorities in the province, but also the Court (in at least some of these cases) had to determine, for the first time, questions of fundamental importance to the position of civil liberties within the Canadian federal system.<sup>27</sup> As we have shown in the quantitative part of this study, it was this series of cases which, in so far as "potential bicultural issues" were concerned, was the most significant source of the Supreme Court's



reversals of the Quebec Court of Appeals and of those divisions of the Supreme Court's judges which found the French Canadian judges dissenting against an Anglo-Saxon majority. Thus here we must explore these decisions in more detail to see what kind of value conflicts the cases entailed and how the Court's resolution of these conflicts affected the rights and interests involved.

Taking these cases in chronological order the first one was *Boucher v. The King* [1951] S.C.R. 265. This case concerned a Jehovah's Witness who had been convicted of seditious libel under the federal Criminal Code for distributing in a rural area of Quebec a pamphlet entitled "The violent hatred of Quebec for God, for Christ and for liberty is a matter of shame for all Canada."<sup>28</sup> On the immediate question of whether the trial judge had erred in directing the jury, the Supreme Court without dissent<sup>29</sup> agreed with the dissenting minority of Quebec's Court of King's Bench that the judge had misdirected the jury. But on the larger issue of whether there was sufficient evidence upon which a jury could conclude that the accused had committed a seditious libel, the Court was divided: five judges, Justices Kerwin, Rand, Kellock, Estey and Locke, found that the pamphlet in question did not provide evidence of sedition and consequently held that Boucher should be acquitted, while on the other side, Justice Cartwright together with the three French Canadian judges, thought there was sufficient evidence and would have ordered a new trial.

With eight judges writing separate opinions (Justice Fauteux concurred with Justice Cartwright) it is not easy to summarize the essential points of disagreement between the majority and the minority in this case. However, two main points stand out. The first concerns the test of what constitutes a seditious libel. Here perhaps the outstanding feature of the Court's decision was the fact that the Court's majority "removed a rather vague idea that merely saying or writing something that might stir up feelings of ill-will between different classes of subjects constituted sedition in itself, whether or not there was an intention to incite to violence."<sup>30</sup> It should be noted that Justice Cartwright who spoke for Justice Fauteux agreed with the majority on this point, and inferentially Justice Taschereau also subscribed to the view that an expression of opinion which is "calculated to promote feelings of ill-will" is not seditious unless, in addition, it is "intended to produce disturbance of or resistance to the lawfully constituted authority" (*Boucher v. The King* [1951] S.C.R. 283). Only Chief Justice Rinfret stood apart from his colleagues on this point; he refused to admit the relevancy of English authorities to the filling out of the definition of sedition in the Criminal Code and by implication accepted a much wider definition of sedition—one which was certainly wide enough to enable him to conclude "without hesitation" that statements in the pamphlet were seditious libels. Justice Cartwright, supported by his two Quebec colleagues, based his dissent on that part of the Jehovah's Witness pamphlet which charged that the Quebec courts were all controlled by Roman Catholic priests. In the minority's view this was evidence of



a seditious intention to bring the administration of justice into hatred or contempt or to excite disaffection against it. Against this view the majority insisted on a narrower test of sedition which would require evidence of an intention to incite people to violence against the administration of justice.

In the process of working out their definition of sedition the members of the majority expressed an underlying interest in ensuring that the crime of sedition be not interpreted in a way which would seriously curtail the give and take of contentious debate so essential to a liberal democracy. Justice Rand was the most articulate exponent of this theme, asserting that "Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life. The clash of critical discussion on political, social and religious subjects has too deeply become the stuff of daily experience to suggest that mere ill-will as a product of controversy can strike down the latter with illegality" (*Boucher v. The King* [1951] S.C.R. 285). And Justice Cartwright (with whom Justice Patten concurred) similarly objected to interpreting a seditious intention as "an intention to promote feelings of ill-will and hostility between different classes of subjects" on the grounds that such a definition "would very seriously curtail the liberty of the press and of individuals to engage in discussion of any controversial topic" (*Boucher v. The King* [1951] S.C.R. 333). The main divergence here was in Chief Justice Rinfret's opinion. The Chief Justice went out of his way to express the reverse concern for not interpreting freedom of speech so widely as to endanger public order. He concluded his judgment with the following statement:

I would not like to part this appeal, however, without stating that to interpret freedom as licence is a dangerous fallacy. Obviously pure criticism, or expression of opinion, however severe or extreme, is, I might almost say, to be invited. But, as was said elsewhere, "there must be a point where restriction on individual freedom of expression is justified and required on the grounds of reason, or on the ground of the democratic process and the necessities of the present situation." (*Boucher v. The King* [1951] S.C.R. 277.)

Now this certainly represents a contrasting value-orientation in balancing freedom and order with that manifested in the six opinions written by English-speaking judges. However, we must remember that Justices Patten and Taschereau accepted the liberal element in Justice Cartwright's judgment. On an ethnic basis, perhaps the significant point of contrast lies in the active concern and enthusiasm shown by all of the English-speaking judges for spelling out the need to evolve an interpretation of sedition narrow enough to leave ample room for contentious and radical public debate and discussion.

It may be that a sharper divergence of values or principles is to be found in the judges' assessments of the integrity of the *Belovian's* Witnesses' religious convictions than in their definitions of sedition. On this second point of contrast, it is clear that the five judges who held that there was insufficient evidence to warrant having

a new trial were not prepared to consider as ludicrous or incredible the Witnesses' claim that their pamphlet by moving its readers to adopt "the principles of Christianity" was intended in good faith to remove the sources of friction between their sect and its "persecutors" in Quebec. The minority's tacit unwillingness to accept this defence suggests the contrary belief that the Jehovah's Witnesses' stated intentions could not be taken at face value. The reluctance of the three French Canadian judges to accept the "good faith" of the Jehovah's Witnesses may well have stemmed from their reaction as Quebec Roman Catholics to the abusive language directed by the pamphlet against both the Catholic Church and public officials in Quebec. And certainly it would seem likely that these judges were not in sympathy with the tendency of the majority's approach in so far as it "narrowed the scope of seditious libel to the point where it could not serve as a weapon to restrain the possible excesses of the Jehovah's Witnesses."<sup>31</sup>

Two years later in *Saumur v. Quebec and A.-G. Que.* [1953] 1 S.C.R. 299, the same nine judges divided in the same way, again on an issue involving the Jehovah's Witnesses' attempts to distribute their rather volatile literature in Quebec. On this occasion, Saumur, a member of the sect, had challenged the constitutional validity of a Quebec City by-law passed under the Charter of the City of Quebec, prohibiting the distribution in the streets of any book, pamphlet or tract without the permission of the Chief of Police. Saumur lost his case at the Superior Court level and before the provincial Court of Appeal.

Before the Supreme Court Saumur was more successful—at least on the immediate issue. Four of the judges, Rand, Kellock, Estey and Locke, held that the by-law was legislative in relation to freedom of religion and freedom of the press and that since these freedoms were not civil rights or matters of a local or private nature in the province, the by-law was beyond the legislative power of the province. But the deciding opinion was rendered by Justice Kerwin who, although he took the reverse position on the vital constitutional point and held that the right to practise one's own religion was a civil right under provincial jurisdiction, nevertheless found that the by-law clashed with the provisions of Quebec's *Freedom of Worship Act* and therefore could not operate so as to prevent Saumur from distributing his tracts. While this meant that Saumur's appeal was successful, it also marked the failure of the Court's phalanx of English-speaking liberals to establish, as a governing precept of Canada's constitutional law, that it was beyond the reach of provincial legislative power to curtail such vital freedoms as freedom of worship and freedom of speech.<sup>32</sup>

In fact, the opinions of the four dissenting judges, when added to that of Justice Kerwin, provided a majority for the counter proposition that legislation affecting freedom of worship and the press was not in itself a proscribed area of provincial legislation. Chief Justice Rinfret and Justice Taschereau based their decision on the ground that the pith and substance of the by-law in question was not the restriction of the freedom to express religious beliefs but

rather the regulation and use of the streets—a subject-matter of legislation clearly subject to provincial jurisdiction. However, they went further than this and stated that freedom of worship as a subject-matter of legislation lay within the jurisdiction of the provinces. Justices Cartwright and Fauteux refused to consider a restriction of free speech or freedom of worship as a distinctive subject-matter of legislation for the purpose of determining its constitutional validity. Restrictions on civil liberties, in their view, could only be incidental effects of Dominion or provincial legislation and in this case the provincial legislation, of which the restrictions were an incidental effect, was well within the province's jurisdiction.

What stands out in this division of opinion is the vigorous interest shown by the four common-law judges, led by Justice Rand, in safeguarding essential civil rights of minorities and individuals within the provinces from infringement by provincial majorities. Justice Rand had launched his crusade to establish constitutional protection for the enjoyment of civil liberties in the provinces two years earlier in the case of *Winmer v. S.M.T. Eastern Ltd. and A.-G. Can.* There he had expounded the doctrine that Canadian citizenship carried with it certain rights, including the right to use the highways, which could not be abrogated by a province. In the *Sawmur* case, he followed the path originally marked out by Chief Justice Duff in *Reference Re Alberta Statutes* [1938] S.C.R. 100. Supported by his three colleagues, Estey, Kellock and Locke, he cited the assertion in the preamble of the B.N.A. Act that Canada is to enjoy "a Constitution similar in principle to that of the United Kingdom" as grounds for holding that the freedom of discussion and debate which are essential conditions for the operation of parliamentary democracy cannot be validly curtailed by provincial legislation.

That this activist, liberal approach to constitutional interpretation failed to command the allegiance of the whole Court clearly cannot be entirely explained in bicultural terms. Not only is there the fact that Justices Kerwin and Cartwright rejected it, but further, given the positivist and self-restrained posture which has traditionally characterized jurists in common-law Canada,<sup>33</sup> it would seem unlikely that the policy pursued by the quartet of common-law "liberals" would be uniformly popular with the English-speaking profession. Still it cannot be denied that the three French-speaking judges constituted the indispensable nucleus of that group of judges which rejected the attempt to establish constitutional guarantees of basic civil liberties by judicial construction.

Further, the Quebec jurists, unlike Justices Cartwright or Kerwin, tended in their opinions to show a positive interest in finding constitutional support for the measures adopted by Quebec authorities to curtail the activities of the Jehovah's Witnesses. This is most evident in the following passage of Chief Justice Rinfret's judgment (concurrent in by Justice Taschereau) where he exclaimed: "Who would dare to contend that pamphlets containing the preceding statements, distributed in a city like Quebec, would not constitute a practice



incompatible with the peace and security of the city or province? What tribunal would condemn a municipal council for preventing the circulation of such statements." And he concluded by answering his own question with the emphatic statement that, "a municipality, 90 per cent of whose population is Roman Catholic, has not only the right but the duty, to prevent the dissemination of such infamous material."<sup>34</sup> It is significant too that Chief Justice Rinfret and Justice Taschereau, unlike the rest of their colleagues, were unwilling to look upon the proselytizing activities of the Jehovah's Witnesses as having anything to do with freedom of religious worship. As Chief Justice Rinfret put it, "the pamphlets or tracts that they insist on distributing without authority are of a provocative and harmful character; they do not represent religious actions but anti-social acts."<sup>35</sup>

Certainly the extent to which the approach adopted by Justice Rand and his three colleagues of putting the regulation of freedom of speech and worship beyond provincial jurisdiction clashed with the interests of the Quebec government of the day was demonstrated by the speed with which the Duplessis government in Quebec took advantage of the loop-hole opened up for them by Justice Kerwin's judgment and amended the *Freedom of Worship Act* so as clearly to exclude the Jehovah's Witnesses from its protection. The day after this statute came into force Saumur instituted an action to have it declared *ultra vires*. The Superior Court held the statute *intra vires* but the provincial Court of Appeal without passing on the constitutional question dismissed the action on the ground that, since Saumur had not actually been deprived of the right to distribute Jehovah's Witness literature, the case did not involve a real dispute or *lis* but only an academic question. It is interesting to observe that in *Saumur et al. v. Procureur Général de Québec et al.* [1964] S.C.R. 252, the Supreme Court with Chief Justice Taschereau writing the opinion for a unanimous and full court upheld the decision of Quebec's Court of Appeal. But this was a Supreme Court of which the liberal quartet of the 1953 *Saumur* decision, Justices Rand, Estey, Kellock and Locke, were no longer members—a fact which would seem to have more than a little to do with the Court's total unwillingness to seize upon this occasion to define the limits of provincial power in circumscribing expressions of religious belief.

Two Quebec appeals in 1955 raising questions affecting freedom of religion and minority rights, elicited unanimous responses from the Supreme Court and each case resulted in reversals of Quebec's highest appellate Court. These two decisions thus point to the common denominator of Supreme Court opinion on questions of civil liberties in Quebec and suggest that Chief Justice Kerwin who had replaced Chief Justice Rinfret was working with a little more effect than had his predecessor at avoiding the disunity and fragmentation which had characterized the Court's decisions in the *Boucher* and *Saumur* cases.

First, in *Henry Birks & Sons (Montreal) Ltd. and Others v. City of Montreal and A.-G. Que.* [1955] S.C.R. 799, the Court unanimously held that it was beyond the competence of the provincial government in



Quebec to pass legislation allowing municipalities to promulgate by-laws for the closing of stores on New Year's Day, the Festival of Epiphany, Ascension Day, All Saints' Day, Conception Day and Christmas Day—all Roman Catholic religious holidays. The main opinion was Justice Fauteux's with which Chief Justice Kerwin and Justices Taschereau, Estey, Cartwright and Abbott concurred. Justice Fauteux based his conclusion that the Quebec legislation was *ultra vires* on the same grounds as that advanced by the Superior Court judge and the dissenting pair of judges on Quebec's Court of Queen's Bench—namely, that the legislation in question belonged, like Sunday observance legislation, in the domain of Criminal Law and as such was subject to the national legislature's exclusive jurisdiction under Section 91 (27) of the B.N.A. Act. However, the other three judges—Rand, Kellock and Locke—added to this Criminal Law argument the broader liberal contention that the legislation was beyond the jurisdiction of the province because it was legislation with respect to freedom of religion.

The approach initiated by Chief Justice Duff and pursued by Justice Rand which would, in effect, find an implied Bill of Rights in the B.N.A. Act found even less support on the Court's bench in this case than it had in the *Savmur* decision. Still, against this should be balanced the fact that the decision provided a firm endorsement of the Criminal Law justification for putting compulsory religious observance beyond the province's powers. As D. A. Schmeiser has pointed out: "The potentialities of this decision are immense. It is noteworthy that some of Canada's leading authorities on constitutional law have concluded that religious freedom is within federal competence under the criminal law power, and rely strongly on the *Birks* decision."<sup>36</sup> It is ironic that the approach which seemed most capable of uniting French- and English-speaking members of the Court—namely, the inclusion of freedom of religion in the Criminal Law power—while as restrictive of provincial power as the Duff-Rand doctrine, was, potentially, much more generous to federal power than the implied Bill of Rights position. While Chief Justice Duff, Justice Rand and those other common-law judges who endorsed their approach had employed it to deny only provincial competence to limit vital freedoms, they had not ruled out the possibility that the same doctrine might be used to restrict the Dominion Parliament's power in this field. But the Criminal Law approach leaves freedom of religion completely under federal control.

There is one interesting qualification to this aspect of the case. Justice Fauteux towards the end of his judgment (concurred in, it should be recalled, by five other judges) threw open the question, without determining it, of whether the terms of the Quebec Act of 1774 granting Roman Catholics in Quebec the free exercise of their religion, "have the effect of restraining exercise of the general power subsequently attributed exclusively to Parliament by paragraph 27 of Article 91 . . . ."<sup>37</sup> Perhaps there is some evidence here of a bicultural divergence between the sources from which a French Canadian jurist like Justice Fauteux, on the one hand, and Justice Rand

and his English-speaking liberal colleagues, on the other, would derive the prime social values to be secured by judicial interpretation. Whereas Justice Rand and his supporters have articulated their premises in terms of the values of individual expression inherent in the British parliamentary tradition, Justice Fauteux looks to the historic rights of the French Roman Catholic community in British North America as a possible reservoir of fundamental freedoms.

The second 1955 decision involving a question of freedom of religion which found the Court undivided, at least on the disposition of the appeal, was *Chaput v. Romain et al.* [1955] S.C.R. 834. The Court's unanimity is all the more interesting inasmuch as it was the first of a series of three disputes in which the Supreme Court, reversing the Quebec Appeal Court, upheld actions initiated by Jehovah's Witnesses against Quebec authorities and in the latter two of which—the *Roncarelli* and *Lamb* cases of 1959—all three of the Court's civilian judges dissented from the Court's decision. Thus the *Chaput* case, like the *Birks* case, points to the consensus of opinion which may exist on the Supreme Court with respect to civil liberties. The decision, in this instance, indicates the circumstances under which both Quebec and non-Quebec judges are likely to agree in interpreting the law governing public authorities so as to allow an action for civil remedies by persons who consider themselves to have been deprived of a fundamental civil right.

The Court was certainly assisted in reaching a unanimous determination of the *Chaput* case by the extremely arbitrary character of the police behaviour involved. Three Quebec provincial police officers, acting on instructions from their superiors, broke up an admittedly orderly religious meeting of Jehovah's Witnesses in Chaput's home, confiscated a quantity of religious literature and ordered all present to disperse. The entry and seizure were made without warrant and at no time was any charge laid against any of the participants in the meeting. The only excuse offered for this procedure was the officers' belief that the Jehovah's Witnesses were seditious.<sup>38</sup>

The crux of the Court's decision was that the officers had not acted in good faith (indeed the majority held that they acted illegally) and, therefore, they could not enjoy the special statutory privileges which they had successfully invoked before the Quebec courts, for this statutory protection only applied to an officer who "has acted in good faith in the execution of his duty." It is significant that Justice Taschereau whose opinion was supported by Chief Justice Kerwin and Justices Estey, Fauteux, Cartwright and Abbott,<sup>39</sup> in defending his view that the officers' act was "reprehensible," displayed the gulf between his own appreciation of religious freedom and that of the members of the majority of Quebec's Court of Appeals. Whereas Justice Bissonnette of the latter court had supported the police officers' raid on the Jehovah's Witness meeting with the contention that "Everyone knew that they (i.e. the Jehovah's Witnesses) were thoroughly spurned in Quebec and nothing has been changed in this respect,"<sup>40</sup> Justice Taschereau supported his condemnation of that raid by the following affirmation of the right of the Jehovah's

Witnesses to freedom of worship: "In our country there is no state religion. No one is required to adhere to any belief whatsoever. All religions are on the same footing of equality, and all Roman Catholics as well as all Protestants, Jews and adherents of the various other religions have complete liberty to think as they wish. The conscience of each person is a personal concern and the concern of no one else. It would be distressing to think that a majority could impose its religious views on a minority."<sup>41</sup>

The one possible point of bicultural cleavage in the Supreme Court's approach to this case lies in the difference between the reasons advanced by Justice Kellock (who was the one other judge besides Justice Taschereau to write a lengthy judgment) and those advanced by Justice Taschereau for holding that Quebec's *Magistrate's Privilege Act* did not grant an immunity from civil wrongs to those subject to its provisions. Justice Taschereau was content to postulate this simply as a precept of Quebec's civil law based on Article 1053 of the Civil Code. But Justice Kellock (with Justice Rand concurring) endeavoured to strengthen this interpretation of the Quebec statute by arguing that, since it was originally derived from an English statute its background was not the civil law but English common law, one precept of which was, as Dicey put it in his *Law of the Constitution*, that ". . . every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justifications as any other citizen." In developing this rationale Justice Kellock indicated that he might be willing to go much further than the civilian judge, Justice Taschereau, in reading the prescriptions of the Anglo-Saxon Rule of Law ideal into statutes governing Quebec's public authorities. Justice Kellock crystallized this potential source of cleavage when he stated that, "Questions which concern the relation of the subject to the administration of justice in its broadest sense are part of the public law and, therefore, governed by the law of England and not by that of France. . . ." (*Chaput v. Romain et al.* [1955] S.C.R. 854).

The clearest test of the Court's attitude to the issue of free speech and its most significant confrontation with the political values of the Duplessis government in Quebec were provided by the fifth case in this series, *Switzman v. Elbling and A.-G. Que.* [1957] S.C.R. 285. The central question in this case was the constitutional validity of Quebec's *Communist Propaganda Act* (the so-called "Padlock Law") passed in 1937 to prevent the propagation of communism. Perhaps the most important fact about the Supreme Court's decision in this case is simply that, with only one dissenting vote (Justice Taschereau), it ruled the Act invalid. Also the Court's majority once again reversed the majority of Quebec's Court of Queen's Bench.<sup>42</sup>

Looking more closely at the Court's decision, two points of interest emerge. First, as for the grounds of the majority's decision, it is significant that five judges (Chief Justice Kerwin, and Justices Fauteux, Cartwright, Locke and Nolan) based their judgment that the Act was beyond provincial powers solely on the Criminal Law viewpoint. In their view the Act in "pith and substance" was in respect to



Criminal Law and consequently within the exclusive jurisdiction of the Parliament of Canada. But the other three members of the majority took the more activist, civil-libertarian approach and held that the statute constituted an unjustifiable interference with freedom of speech. Here again it was the declaration in the preamble of the B.N.A. Act that Canada's constitution was to be "similar in principle to that of the United Kingdom" which was cited as the constitutional foundation for this position. In Justice Rand's words, this declaration implies a system of ". . . parliamentary government, with all the social implications, . . . This means ultimately government by the free public opinion of an open society . . ." (*Switzman v. Elbling and A.-G. Que.* [1957] S.C.R. 306). Justice Abbott pushed this doctrine for the first time to its final conclusion and declared that, "The power of Parliament itself could not abrogate this right of discussion and debate" (*Switzman v. Elbling and A.-G. Que.* [1957] S.C.R. 328).

Inspiring as the judgments of this trio of judges may have been to those who are enthusiastic about the use of judicial review to secure what they deem to be fundamental liberties from legislative encroachment, such civil libertarians should be sobered by the fact that again it was the Criminal Law approach and not the implicit Bill of Rights theory which the Court's majority endorsed. Indeed the decision indicates that the broad civil liberties jurisprudence, of which Justice Rand was such an articulate exponent, was losing ground on the Supreme Court during the 1950's. Of the four judges who had supported the Duff-Rand preamble doctrine in the *Saumur* case, one, Justice Estey, had deserted this approach for the Criminal Law approach in the *Birks* case and his replacement, Justice Nolan, in this case also confined himself to the Criminal Law rationale. A second member of the *Saumur* quartet, Justice Locke, while he had supported Justice Kellock's rather vague allusion to the broader civil liberties position in the *Birks* case, now in the *Switzman* case chose not to concur in either Justice Rand's or Justice Kellock's opinion and instead concurred with Justice Nolan. Thus it was clear by the time of the *Switzman* case that the aspect of civil liberties upon which all of the Court's members could agree was simply that provincial legislation could not validly restrict a fundamental freedom if, in essence, the legislation was creating a new category of criminal activity. It should be noted that even Justice Taschereau, the sole dissenter, accepted this constitutional principle in the *Switzman* case as he had in the *Birks* case.

This brings us to the second point of interest, Justice Taschereau's dissent, which manifested a deep anti-communist sentiment. Justice Taschereau accepted the Criminal Law formulation of the constitutional question but then denied that the Act in question was criminal law. Instead he characterized the law as one dealing essentially with the regulation of property to protect society "contre tout usage illégal." And, although it was essential to his argument to contend that the legislature ". . . has not in any way given a criminal character to the doctrine of communism,"<sup>43</sup> he was



convinced that if the province could adopt laws designed to suppress conditions which might lead to crime it must also have "the power to decree that those who preach and write doctrines of a kind to favour treason, the violation of official secrets, sedition, etc. be deprived of the enjoyment of the building from where they propagate these theories intended to undermine the basis of society and overthrow established order."<sup>44</sup> Here there is the clear implication that communist political activity, because of the crimes to which it might lead, can be legitimately outlawed.

We might compare the Court's division in the *Switzman* case with the approach its members took in *Smith and Rhuland Limited v. The Queen* [1953] 2 S.C.R. 95. Although the latter case, involving an appeal from the Supreme Court of Nova Scotia, does not belong to this series of Quebec civil liberties cases, we introduce it here because it was the one other case in the period under consideration which provided some reflection of the judges' attitudes to communism and the rights and freedoms which its exponents ought to enjoy in Canadian society. The case involved a Labour Relations Board's refusal of certification to a union on the sole ground that its acting secretary-general was a communist who exercised a dominant influence in the operation of the Union. There was general agreement that the Labour Relations Board had a discretionary power to grant certification but the judges split on the question of whether the Board had exceeded the limits of its discretion when it based its decision on the political affiliations of one of the Union's leaders. The majority consisting of Justices Kerwin, Rand, Kellock and Estey held that the communist associations of trade unionists were not among the Board's proper concerns and that therefore the Board had exceeded its jurisdiction. The minority, consisting of Justices Cartwright, Fauteux and Taschereau, dissented from this view and held that the communist leadership of the Union was not an extraneous consideration in the exercise of the Board's discretion.

Justice Rand's judgment in the *Smith and Rhuland* case expressed an acute sensitivity to the issues which were being so dramatically raised by McCarthyism in the United States. The key to his judgment was his willingness to treat communists on the same plane as the other political movements which compete for power in a liberal democracy. He argued that one of the basic considerations shaping legislative policy in Canada was that:

The dangers from the propagation of the communist dogmas lie essentially in the receptivity of the environment. The Canadian social order rests on the enlightened opinion and the reasonable satisfaction of the wants and desires of the people as a whole: but how can that state of things be advanced by the action of a local tribunal otherwise than on the footing of trust and confidence in those with whose interests the tribunal deals? Employees of every rank and description throughout the Dominion furnish the substance of the national life and the security of the state itself resides in their solidarity as loyal subjects. To them, as to all citizens, we must look for the protection and defence of that security within the governmental

structure, and in these days on them rests our immediate responsibility for keeping under scrutiny the motives and actions of their leaders. (*Smith and Rhuland Limited v. The Queen* [1953] 2 S.C.R. 99-100.)

Rand's insistence that Canadian citizens must not have their rights adversely affected, merely because they are communists, certainly contrasts with Justice Taschereau's lower degree of tolerance for communism as manifested in the *Switzman* case and with the dissenting position of Justice Cartwright, Justices Taschereau and Fauteux here in the *Smith & Rhuland* case. But again there are obvious reasons for resisting a simple bicultural explanation: a refusal to extend the open society freedoms to communists has been evident in many sections of North American society in the postwar and cold war years, and within Quebec there were certainly many who were hostile to attempts to outlaw the Communist party. However, it may be that the particular stratum of French Roman Catholic society from which the Supreme Court's French Canadian members were drawn was especially prone to accept limitations on the political freedoms of communists. This is a point which we shall take up again in concluding this section.

The final two cases in this series, *Roncarelli v. Duplessis* [1959] S.C.R. 121 and *Lamb v. Benoit* [1959] S.C.R. 321, climaxed the litigation arising out of the Quebec government's efforts to terminate the proselytizing activities of the Jehovah's Witnesses. The Supreme Court's handling of these two cases brought the situation back full circle to that which obtained when the Jehovah's Witnesses first brought their complaints against Quebec authorities to the Supreme Court in the *Boucher* and *Saumur* cases in the early 1950's. In both the *Roncarelli* and the *Lamb* cases the Supreme Court's majority upheld the Jehovah's Witnesses' actions against the Quebec authorities, reversed Quebec's highest court of appeal and rejected the arguments advanced by the Court's French Canadian members.

The *Roncarelli* case was the most spectacular of the two cases and attracted a considerable amount of public attention. Indeed given the fact that the respondent in the case was Quebec's Premier, Maurice Duplessis, it is likely that of all the cases coming before the Court since it became Canada's final court of appeal in 1949, the *Roncarelli* case was the one which attracted the most national attention. Hence the Court's treatment of the dispute had ramifications extending beyond its immediate effect on the interests of the Quebec contestants—ramifications which had a real bearing on the Court's image as a decision-making agency whose work could have an impact on national political interests.

The *Roncarelli* case arose out of an action brought by Roncarelli, the owner of a Montreal restaurant, against Duplessis for damages resulting from the cancellation of his liquor licence by the Quebec Liquor Commission. There was no serious question as to the fact that Duplessis in his capacity as Attorney-General had intervened and instructed M. Archambault, the Liquor Commissioner, to cancel Roncarelli's licence. Nor was there any real doubt about the motive which prompted Duplessis' intervention. Roncarelli, a member of the

sect of Jehovah's Witnesses, had been providing bail for a large number of his co-religionists charged with infractions of municipal by-laws for distributing their pamphlets. When this was brought to Duplessis' attention by M. Archambault, the Premier decided that Roncarelli should not enjoy the privileges of a Quebec liquor permit if he was using the profits made possible by this permit to thwart the efforts of municipal and provincial authorities to clamp down on the Jehovah's Witnesses. The real question was whether Duplessis' intervention was illegal and might lead to an actionable wrong and, further, whether, if it was illegal, Duplessis was protected by Article 85 of Quebec's Code of Civil Procedure. Article 85 required that notice be given within a month of the event as a condition for bringing an action for damages against a public officer for an act done by him in the exercise of his functions. The notice had not been given.

From our perspective the interesting aspect of the division of opinion on the Court in answering these questions was the extent to which the position of the majority consisting of five common-law judges (Chief Justice Kerwin, Justices Rand, Martland, Locke and Judson) and the English-speaking civilian, Justice Abbott, turned on reading the prescriptions of the English ideal of the Rule of Law into the statutes defining the powers of Quebec authorities. Although the *Act Respecting Alcoholic Liquor* establishing the Liquor Commission's power to grant liquor permits did not attach any specific qualifications to the exercise of that power, the majority contended that it could only be used for purposes relevant to the general purpose of the Act and the prosecution of Jehovah's Witnesses was not one of those purposes. Justice Rand, in developing this argument, reflected on the dangers of allowing any governmental officer an unfettered discretion to use his power for any purpose or "personal" interest unrelated to the purpose of his public office:

. . . that, in the presence of expanding administrative regulation of economic activities, such a step and its consequences are to be suffered by the victim without recourse or remedy, that an administration according to law is to be superseded by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure. (*Roncarelli v. Duplessis* [1959] S.C.R. 142.)

The same line of reasoning also provided the rationale for the majority's rejection of Duplessis' second line of defence based on Article 88 of the Quebec Code of Procedure. This Article applied only to a public officer "in the exercise of his functions" and the majority argued that it was not part of Duplessis' functions as Attorney-General to instruct the Liquor Commissioner to deprive Roncarelli of a liquor permit. In committing this act Duplessis, in their view, had not exercised any legally authorized power and consequently had acted as a private person.



It is significant that this emphasis on the Rule of Law as a limitation on administrative discretion was irrelevant to the approach taken to this case by the two French Canadian members of the Court as well as to that taken by the judges in Quebec. To these judges it appeared that if Duplessis had no discretion to exercise in the field of granting liquor permits (and they concluded that he had none) it was not really relevant to consider whether or not he had abused his discretion.<sup>45</sup> Justice Fauteux, for example, held that the cancellation of the permit was illegal because the Commission, which under the *Alcoholic Liquor Act* had the exclusive power to issue permits, had abdicated its power to Duplessis. But Justice Fauteux, like Justice Taschereau, disagreed with the majority's contention that Duplessis had lost the protection of Article 88 because he had acted outside of his functions. In Justice Taschereau's view, while Duplessis may have erred in exercising his functions, what he had done was certainly among his functions "as a public officer, charged with the prevention of disturbances, and guardian of the peace in the province."<sup>46</sup> Justice Fauteux carefully traced the legislative history of Article 88 and its judicial construction in the Quebec courts and concluded that these Quebec sources established that a public officer was not considered as ceasing to act within his functions solely because an act committed by him was an abuse of his power, or excess of jurisdiction, or even a violation of a law.<sup>47</sup>

Clearly a conflict of political and social values was operative in the diverging paths of legal reasoning followed by the two groups of judges. The interest of the Supreme Court majority in using judicial review to read Rule of Law prescriptions into the statutory powers exercised by the executive branch of government clearly was not an overriding concern of either the Quebec appeal court judges who dealt with this case or Justices Fauteux or Taschereau. Also, the latter judges' readiness to include among Duplessis' functions his use of the Liquor Commission's discretion as an instrument for combatting the Jehovah's Witnesses points to a much more tolerant attitude towards the Quebec government's campaign against that sect than that held by the Supreme Court's majority.

The final decision in this sequence of cases, *Lamb v. Benoit* [1959] S.C.R. 321, was provoked by the action of Quebec police against distribution of that same Jehovah's Witness tract, *Quebec's Burning Hate*, as had raised the disputes dealt with by the Court in the *Bouvier* and *Roncarelli* cases and which indirectly inspired the litigation which led to the *Saurmur* case. This particular dispute arose when Quebec police arrested the plaintiff, Louise Lamb, a Jehovah's Witness, along with three other Witnesses, for distributing pamphlets on a street corner in Verdun. The three other persons were distributing the pamphlet entitled *Quebec's Burning Hate*, which at the time was considered to be seditious. However, there was no evidence that Miss Lamb was distributing that particular publication nor any other literature that was in any way objectionable. After being detained for the weekend, she was offered her freedom by the police officer Benoit on condition that she sign a document to the effect that she would



take no action against the provincial police for having detained her. She refused, was then charged with conspiring to publish the pamphlet, *Quebec's Burning Hate* and, after being freed at her preliminary hearing, brought an action for false arrest and damages against Benoit and two other officers involved in her detention.

There was no disagreement among the Supreme Court judges in dismissing the action against Benoit's two fellow officers on the grounds that they were not responsible for Miss Lamb's arrest. But the Court's six common-law judges departed from all the Quebec judges who had dealt with this case and their three civilian brethren on the Court, Justices Taschereau, Fauteux and Abbott, in upholding the action against Benoit. The key point of difference between the legal reasoning of the Supreme Court's majority and that followed by the Quebec civilian judges was whether Section 24 of Quebec's *Provincial Police Act*, limiting liability of police officers to actions instituted within six months of the alleged offence, applied where the police officer had acted maliciously or not "in good faith" and without good and probable cause. This provision of the *Provincial Police Act*, unlike that contained in the *Magistrate's Privilege Act* (which had been unsuccessfully invoked by the police in the *Chaput* case), did not explicitly state that it applied only to acts done "in good faith." Nevertheless the Supreme Court majority argued that good faith was an implicit element in a police officer's actions when performing his official functions and Benoit's manifest lack of good faith (as found by the Quebec Court of Appeal) deprived him of the protection provided for police officers by the Quebec statute.

In arriving at this conclusion the Supreme Court's common-law majority showed a deep concern for establishing certain norms as uniform postulates underlying public law throughout Canada—especially those areas of public law (as was the case here and in the *Chaput* case) which are related to the enforcement of criminal law. It was this interest which manifestly underlay the determination of both Justice Rand and Justice Locke (who wrote the principal judgments for the majority<sup>48</sup>) to make "good faith" a necessary condition of an act done by an officer in his official capacity. This use of judicial review to sustain Dominion-wide enforcement of certain common-law norms in the domain of public law is most evident in Justice Locke's reliance on a series of English authorities interpreting the English *Public Authorities Act*. Justice Locke justified this invocation of English authorities by citing Justice Kellock's judgment in the *Chaput* case which viewed laws governing the powers and privileges of public authorities in Quebec as being historically founded on principles of English law. To this Justice Locke added the further consideration that, since Quebec's *Interpretation Act* instructing judges to interpret statutes in a "fair, large and liberal" manner is modelled after the *Interpretation Act* of Canada and stems originally from an English-inspired statute of the pre-Confederation period, it inferentially makes English authorities relevant to the interpretation of all those Quebec statutes to which Quebec's *Interpretation Act* applies.

The crux of the minority's dissent was the rejection of the importation of English authorities into the interpretation of Quebec's local legislation governing the civil responsibility of police officers. The three civilian judges all insisted that the *Provincial Police Act*, unlike the *Magistrate's Privilege Act* which Justice Kellock in the *Chaput* case had traced to English antecedents, was strictly of local Quebec origin. It had been enacted by the Quebec legislature in 1879 and Section 24 was clearly designed to qualify Article 1053 of Quebec's Civil Code so as to reduce the time limit within which actions for damages against police officers could be taken from the normal two years to six months. Thus in their view "precedents of common law," to quote Justice Taschereau, "... have no application, and cannot help us in the solution of this litigation."<sup>49</sup> They concluded that since the action had been initiated after six months had elapsed and the question of "good faith" was irrelevant to deciding whether Benoit was protected by the Act, the action against Benoit should be dismissed.

We have analyzed this series of cases in considerable detail because this is the one group of decisions in which our quantitative analysis pointed to the persistence of a bicultural cleavage of opinion among the Supreme Court's judges as well as between the Supreme Court's majority and the majority of appellate judges in Quebec. Our analysis of the issues involved in these cases and the different judges' treatment of them certainly has indicated that the Supreme Court's reversal of the Quebec Court of Appeals in all of these cases and the marked tendency of the Court's French Canadian members to dissent from the majority's judgments are not coincidences, but are the outcome of a basic clash of social and legal values. The line of cleavage was most clearly marked in the cases involving the Jehovah's Witnesses. It was only in these cases (all but *Chaput*) that all of the French-speaking Quebec members of the Supreme Court dissented from the majority's reversal of the Quebec Court of Queen's Bench. In these Jehovah's Witness cases, the Supreme Court's non-Quebec majority showed an ideological hostility to the program of legislative and executive action pursued by the Duplessis administration in Quebec against the Jehovah's Witnesses. The Quebec judges displayed a considerable sympathy for the "necessity" of that program and for the legal capacity of the province to carry it out. On the larger constitutional question raised by some of these cases concerning the scope of provincial power under the B.N.A. Act to curtail fundamental freedoms, the Supreme Court came close to establishing a consensus among its own members at least on the point that a province could not enact criminal law as a means of controlling speech or compelling a pattern of worship. In going this far, it diverged from the Quebec courts which viewed the legislation challenged in the *Saumur*, *Birks* and *Switzman* cases as unexceptional exercises of established provincial powers.

Our analyses of these cases—quantitative and qualitative—up to a point support the conclusion reached by Professor Edward McWhinney with regard to this area of the Supreme Court's activity. Professor

McWhinney concluded his review of the Court's decisions in the Jehovah's Witness cases with the following remarks:

The Supreme Court of Canada, by majority vote (with the judges tending to line up somewhat according to their own ethnic cultural affiliations) has preferred "Open Society" values, and has come down clearly on the side of the interests in speech and religion as advanced by the Jehovah's Witnesses. Insofar as these "Open Society" values accord essentially with the attitudes of the English-speaking majority of Canada, the Supreme Court of Canada has preferred national values over provincial values. . . .<sup>50</sup>

Certainly it is evident that the Supreme Court's majority, through its decision-making in these cases, upset the Quebec government's preference for social order over freedom of speech and worship for sects which propound a creed thoroughly abusive to the faith of the majority of the province's inhabitants. But in doing so did it impose the standards of English-speaking Canada on those of French-speaking Canada?

It would be reasonable to answer this question in the affirmative if we took the Duplessis administration's attack on the Jehovah's Witnesses as representing the fixed and homogeneous position of the major part of Quebec's population towards civil liberties. But such an assumption surely would be untenable. There is ample evidence to suggest that there were many in Quebec who opposed the Duplessis government's willingness to use the power of the state to limit the activity of unpopular religious or political groups. Further, the rapid changes which have taken place in Quebec society and politics have undoubtedly reduced the pervasiveness of traditional Roman Catholic attitudes and have stimulated the development of more secular, liberal conceptions of individual rights and freedoms. Some of the interests and aspirations generated by these changes in Quebec society found political expression in the collapse of the Duplessis regime and the election in 1960 of a Liberal administration headed by Premier Lesage. The contrast between this government's approach to civil liberties and that adopted by earlier Quebec governments was revealed soon after it came to power. At the Dominion-Provincial Conference of July, 1960 Premier Lesage came out strongly for a Bill of Rights incorporated in the Constitution and binding on the provinces. He referred to the need for such a Bill with the following words: "The experience of recent years has convinced the Quebec government that human rights were not sufficiently protected under provincial jurisdiction. We therefore believe that we must now have a bill of rights. Our opinion also is that such a bill would have great value, both real and symbolic, if it were a part of our constitution."<sup>51</sup> As is well known the goal of a Constitutional Bill of Rights has not yet been realized, but this certainly cannot be attributed to a bicultural division of opinion.

Looked at from a more dynamic point of view, the Court's majority rather than being considered to have simply vetoed the policies of Quebec's majority might be said to have acted as a judicial vanguard



for significant forces which were beginning to agitate Quebec society and which, during the 1950's, were in the process of becoming the predominant element in the province's political life. If this interpretation of the Court's role is correct, then we may have here a peculiar illustration of the cultural time lag which in a dynamic society may come to separate the outlook and opinions of judges who are appointed for life from the attitudes of leaders of popularly elected governments.<sup>52</sup> In this case the tension has been between a popular movement on the provincial level towards more liberal-democratic and secular values and Quebec judges (both in the provincial judiciary and the Supreme Court) appointed by a federal authority less responsive to these modifications of effective political opinion in Quebec.<sup>53</sup> The Supreme Court judges appointed from English-speaking Canada have, on the other hand, come from a society in which the "Open Society" freedoms have had the allegiance of the main stream of opinion both within and without the legal establishment for a much longer period of time. Hence they have had more in common with the newer forces in Quebec society, at least insofar as those forces have carried with them a broader concern for individual and minority rights and a greater tolerance for the propagation of anti-Catholic religious sentiments.

This dynamic analysis suggests that it is a misleading over-simplification to conclude from this series of Quebec civil liberties decisions that the Supreme Court has imposed the values of the national majority on the provincial majority in Quebec. No doubt our view here depends very much on assumptions about certain changes occurring in the governing value premises of Quebec society. Our substantiation of these assumptions would take us far beyond the scope of this work. Then, with regard to those cultural values related to balancing the desire for social order against the interest in securing the rights of individuals to propagate unpopular religious and political doctrines, suffice it to say that we accept the view recently expressed by D. Kravnick, "Today . . . the particular outlook, orientation, and value system which differentiated French Canada are in the process of rapid disintegration."<sup>54</sup> We think some further evidence is provided for this view by the fact that the Supreme Court's judicial veto of the Quebec government's attempts to limit freedom of speech and worship was not resisted by a widespread popular reaction in Quebec.

But we should also notice that the flow of influence in these decisions has not been entirely one way, from the national Court to the provincial culture. Quebec's representatives have clearly influenced the position taken by the Court in these vital questions of civil liberties. The most significant influence they have had is on the basic issue of the position of civil liberties under the B.N.A. Act. On this question they were an indispensable element in that judicial alliance which gave Supreme Court authorization for classifying restraints on civil liberties which employ criminal sanctions as Criminal Law beyond provincial jurisdiction. On the other hand, the Duff-Rand approach, which they would not support, gave an autonomous value



to legislation curtailing fundamental communicative freedoms and, on the basis of an implied Bill of Rights in the preamble of the B.N.A. Act, put such legislation beyond the reach of the provinces and possibly of the national legislature too. Thus the French-speaking Quebec justices have acted more as one of the minorities rather than *the* minority on the Court's bench. In this area of constitutional law relating to civil liberties as well as in other areas of decision-making, what Robert Dahl has said of the United States Supreme Court would seem applicable to its Canadian counterpart: "Few of the Court's policy decisions can be interpreted sensibly in terms of a 'majority' versus a 'minority.'" In this respect the Court is no different from the rest of the political leadership. Generally speaking, policy at the national level is the outcome of conflict, bargaining, and agreement among minorities; the process is neither minority rule nor majority rule but what might better be called *minorities* rules."<sup>55</sup> And similarly the fact that the final consensus which did emerge on the Court accepted the Criminal Law approach rather than the more activist and, in civil-libertarian terms, more radical, implied Bill of Rights doctrine, would appear to lend support for the application to Canada of Dahl's thesis that ". . . The Supreme Court is inevitably a part of the dominant national alliance."<sup>56</sup>

#### D. Other Potential Bicultural Issues

In the three preceding sections of this chapter we have seen some evidence of cleavages of opinion which may be partially attributed to the cultural background of the judges—most notably in connection with civil liberties in Quebec and, in the family relations cases, at least in the *Donaldson* decision. However, we have also seen that it is a gross over-simplification to refer to these clashes of social values and outlooks in simple bicultural terms as French Canadian *versus* English Canadian conflicts. Even where the dichotomy between the political and social philosophies of the judges is most evident, as for instance between Justices Taschereau and Rand in the *Sauvage* and *Switzman* cases, while it is clear that the views of both judges have been conditioned by traditions and ideas which have wide currency in the particular sections of Canada from which they come, it is equally clear that these particular ideas and traditions do not represent homogeneous French Canadian or English Canadian cultures. Whether they represent the prevailing trend of opinion within the two cultures must remain a matter of dispute. But, as a minimum, we have insisted that with regard to the social values expressed by the French Canadian jurists, they represent a phase—a traditional, largely Roman Catholic phase—of French Canadian society which, however much it may have predominated in the past is now seriously challenged by a more secular, liberal outlook.

Now in this final section of Chapter V we simply wish to sum up our study of leading cases in those areas of potential bicultural conflict not yet dealt with. This summary takes in a wide range of

issues and includes the various issues and cases identified in Question 11 of our quantitative questionnaire. Thus it includes cases which raise questions relating to religion, obscenity, education, racial discrimination, the due process of law in the administration of law and the review of decisions made by administration tribunals, civil liberties outside the context of Quebec society, and the division of powers in Canadian federalism. Our study of the Court's divisions in these cases and of its differences with provincial appeal courts has, with a few slight exceptions, indicated that these differences are not significantly or consistently the outcome of a bicultural difference of opinion. Thus our qualitative analysis of leading decisions bears out the general outcome of our quantitative study—that it is only in those decisions concerning civil liberties in Quebec that a "bicultural factor" has been a significant determinant of the Court's decision-making.

We do not feel that it would be worthwhile to set out here all the evidence for this negative finding. What we will do is look at the cases which appear to be exceptional and make some attempt to summarize the general way in which the Court has divided in these areas of "potential bicultural" cleavage.

Decisions concerning the application of the *Lord's Day Act* might be expected to create situations in which the religious aspect of the judges' cultural background would affect their approach to the case. However, a number of recent cases which have concerned legislation compelling observance of Sunday as a day of rest provide no clear evidence that religious convictions related to a determinate cultural background or denomination have affected the division of opinion among the judges in the treatment of this issue. In two cases the Supreme Court was divided as to whether a particular activity taking place on Sundays was in violation of Section 4 of the federal *Lord's Day Act* which, with certain qualifications, proscribes the conduct of business on Sunday. In *Canadian Broadcasting Corporation v. A.-G. Ont.* [1959] S.C.R. 188, the majority, consisting of three Protestants—Justices Rand, Locke and Cartwright—and one French Canadian Roman Catholic—Justice Fauteux—held that the *Lord's Day Act* did not apply to the C.B.C., while Justice Taschereau, a French-speaking Catholic, was supported in dissent by two English-speaking Protestants—Justices Abbott and Judson. Again in *Gordon v. The Queen* [1961] S.C.R. 592, it was an alliance of Protestants and Catholics (Justices Taschereau, Fauteux, Abbott, Martland, Judson, Ritchie and Chief Justice Kerwin) which found the operation of an automatic laundry on Sunday in violation of Section 4 of the *Lord's Day Act*. Justice Cartwright dissented on the grounds that neither the owner nor his employees were required to work in order to operate the laundromat on a Sunday.

In neither case did the reasoning of the judges reveal any deep-seated feelings about the importance, from the point of view of religion, of keeping Sunday as a day of rest. Indeed the strongest expression of interest in maintaining conditions which would foster Christian worship came in Justice Locke's judgment *against* the application of the *Lord's Day Act* to the C.B.C. Justice Locke advanced

the consideration that if the C.B.C. was prevented by the *Lord's Day Act* from operating on Sunday, this would prevent the broadcasting of church services and religious music for the benefit of the sick and the disabled, which he was sure was "regarded as of inestimable benefit by great numbers of Canadian people" (*Canadian Broadcasting Corporation v. A.-G. Ont.* [1959] S.C.R. 203). Again the Court's decision in *Winnipeg Film Society v. Webster* [1964] S.C.R. 280 indicates the absence of religious sources of division on the question of Sunday observance. The Court, consisting of two Roman Catholics—Justices Fauteux and Hall—and three Protestants—Justices Martland, Ritchie and Cartwright—unanimously held that the private, non-profit film club did not violate the *Lord's Day Act* by showing films on Sundays.

A fourth case, *Robertson and Rosetanni v. The Queen* [1963] S.C.R. 651, provides a much more significant test of the judges' attitude to compulsory Sunday observance, although hardly a test which is relevant to the particular Christian denomination to which the judges belong. The issue was whether the *Lord's Day Act* conflicted with the *Canadian Bill of Rights* which requires that every Act of Parliament be so "construed and applied" as not to abrogate any of the rights and freedoms specified in the Act, one of which is "freedom of religion." The majority, consisting of Justices Fauteux, Taschereau, Abbott and Ritchie, decided that the *Lord's Day Act* was not rendered inoperative by the Bill of Rights. But more important than the outcome of the case is the position taken by Justice Ritchie who wrote the majority's judgment on the two key issues—the general import of the Bill of Rights and the meaning of freedom of religion. On the first question Justice Ritchie's judgment committed the Court, in this its first reasoned decision on the Bill,<sup>57</sup> to a view which went even further than some of the lower court's interpretations towards depriving the Bill of any real effect on statutes passed prior to its enactment. Justice Ritchie reasoned that the rights and freedoms protected by the Bill were those which existed when the Bill was passed and hence were rights and freedoms as limited by the laws (including *Lord's Day* observance legislation) which existed at the time the Bill was enacted. On the question of freedom of religion, Justice Ritchie took the rather narrow view that this freedom is only infringed by legislation which has the effect of preventing people from practising their religion and not by legislation which simply imposes a commercial or "business inconvenience" on all so that the followers of one religious tradition can have Sunday observed according to the tenets of their particular religion. Justice Cartwright, the sole dissenter, was diametrically opposed to the majority. He was prepared to give full effect to the Bill of Rights where another Act of Parliament was in conflict with its terms. And on the scope of freedom of religion he expressed the opinion that "... a law which compels a course of conduct whether positive or negative, for a purely religious purpose infringes the freedom of religion." *Robertson and Rosetanni v. The Queen* [1963] S.C.R. 660.

What stands out in the Court's decision in *Robertson and Rosetanni* far more than any possible reflection on the judges' particular



religious sentiments is the rather pedestrian and legalistic character of the Court's treatment of what might be regarded as issues of vital importance to Canadian society. The Court's evaluation of the Bill of Rights as an important guarantee of fundamental rights and freedoms is reflected in the fact that only five judges sat for the case instead of the usual seven- or nine-judge courts which hear about 70 per cent of all constitutional cases.<sup>58</sup> Further, the sources consulted by the majority in working out the significance of freedom of religion as a fundamental human right were confined to some rather scanty references to the subject in earlier Canadian judgments, a "self-imposed horizon of reference" which, as Bora Laskin has suggested, "is not calculated to inspire much confidence in the depth analysis of the issues confronting the court."<sup>59</sup> The alliance of the two civilian and two common-law judges in this case suggests that underlying any differences which might stem from their differing legal or cultural backgrounds is a common judicial style in the treatment of large public law issues which eschews the self-conscious and reflective role of judicial policy-making for a more legalistic posture.

Another issue in which the religious affiliations of judges might be thought to have influenced their judgment is the question of obscenity. Following the Supreme Court's decision on the question of obscenity in *Lady Chatterley's Lover*, there were many suggestions in the press that the division of opinion on the Court was largely the result of Protestant *versus* Roman Catholic moral outlooks. The decision came in *Brodie, Dansky and Rubin v. The Queen* [1962] S.C.R. 681, a Quebec appeal in which the Supreme Court's majority reversed the Quebec Court of Queen's Bench and by a five-to-four decision ruled that Lawrence's novel was not obscene. Bruce Macdonald's analysis in the Toronto *Globe and Mail* was typical of many other newspaper accounts of the judgment: "The majority ruling of the high court was supported by Justices Cartwright, Abbott, Martland, Ritchie and Judson. The first four list themselves in the Parliamentary Guide as Anglicans, while Mr. Justice Judson gives no religious denomination. Those dissenting were Chief Justice Kerwin and Justices Fauteux, Taschereau and Locke. With the exception of Mr. Justice Locke, an Anglican, the dissenting judges are Roman Catholics."<sup>60</sup> No doubt the difference of opinion between the majority and the minority in this case was conditioned by different moral evaluations of *Lady Chatterley's Lover*. All the judges accepted the "undue exploitation of sex" as stated in the recently enacted Section 150(8) of the Criminal Code as a sufficient, if not a necessary, test of obscenity. But they differed in their application of this test—and this difference clearly reflects different degrees of moral shock experienced by the judges in reading the novel. But is this difference in moral judgments necessarily the result of the different Christian denominations to which the judges belong? Surely this is questionable. After all, moral indignation about the "exploitation" of sex in *Lady Chatterley's Lover* has not been confined to Roman Catholic circles.



A more recent judgment of the Court dealing with obscenity casts further doubt on the inference implicit in popular interpretations of the *Brodie* case that the Catholic judge is more apt than the Protestant judge to consider literature obscene. In *Dominion News & Gift (1962) Ltd. v. The Queen* [1964] S.C.R. 251, Chief Justice Taschereau writing the opinion for a unanimous Court including five Protestants, Justices Cartwright, Martland, Judson, Ritchie, and Spence, and one Catholic, Justice Hall, reversed the Protestant majority of the Manitoba Court of Appeal and ruled that issues of *Escapade* and *Dude* magazines held to be obscene by the lower courts were not obscene. In his judgment Chief Justice Taschereau simply accepted the reasons given by the dissenting member of the Manitoba Appeal Court, Justice Freedman. It should be noted that Justice Freedman's dissenting judgment represents one of the most liberal, as well as one of the most thoughtful, examinations of the question of obscenity under Canadian law. In applying the test of "undue exploitation of sex" Justice Freedman warned that, "In this area of the law one must be especially vigilant against erecting personal tastes or prejudices into legal principles."<sup>61</sup> He suggested that the judge should search for a common Canadian standard, and if he did so he would have to take into account the general changes which have taken place in Canadian social mores since the Victorian period and realize that nowadays, for most people, "sex is a topic of parlour conversation."

As with the Court's decisions in the *Lord's Day Act* cases, so here with the cases dealing with obscenity, one is struck much more by the general style of jurisprudence adopted by the judges in settling disputes which establish principles of great importance to the nation's public law than by any differences which the French Catholic or English Protestant backgrounds of the judges may generate in the judges' determination of the issues. In the *Brodie* case at least the Court saw fit to sit as a *plenum* to deal with the question of obscenity. But there was almost a total lack of any collegiality in the Court's resolution of the important legal questions involved, with the result that these questions were not definitively resolved. Nine judges produced seven judgments and as one of the leading authorities on this area of Canadian law, D. A. Schmeiser remarked ". . . there ought to be a law against that. It does not seem unreasonable to expect a Court with so many judges to consolidate its views before each judge begins to write."<sup>62</sup> On the important question of law—whether the definition of obscenity in Section 150 (8) of the Criminal Code is exclusive or whether the so-called *Hicklin* text based on English authorities is still part of Canadian law—four judges ruled that it was exclusive, two that it was not, and three did not commit themselves on the issue. The judges demonstrated a general reluctance to indulge in a wide-ranging exploration of the legal and sociological implications of the law relating to obscenity. In the *Dominion News & Gift* case, following Chief Justice Taschereau, they were willing to leave that kind of self-conscious judicial policy-making to Justice Freedman of the Provincial Appeal Court.

In leading decisions in the other possible areas of bicultural conflict we did not find that the Quebec or French-speaking members of the Court played a distinctive role. Certainly in the important cases appertaining to the division of powers in the B.N.A. Act, they supported the predominant tendency on the Court. In *Johannesson v. West St. Paul* which, of all the Supreme Court's constitutional decisions since the abolition of appeals, has been the one which potentially has the most expansive effect on the central government's power, they supported the Court's unanimous judgment. On the other hand, in a later series of constitutional decisions which in effect developed new areas in which provincial legislation could operate concurrently with federal legislation, they were again part of a large coalition with which only Justice Cartwright consistently disagreed.<sup>63</sup>

In some of the important cases raising civil liberties in a general Canadian setting, the French Canadian judges aligned themselves with the more conservative side of the Court. For instance in *Oil, Chemical and Atomic Workers v. Imperial Oil* [1963] S.C.R. 584, Justices Taschereau and Fauteux together with Justices Martland and Ritchie upheld, as constitutionally valid, British Columbia's legislation designed to prevent trade unions from giving any financial support to a political party. And again, in *Williams v. Aristocratic Restaurants Limited* [1951] S.C.R. 762, Chief Justice Rinfret joined Justice Locke in dissenting from Justice Rand's majority finding that peaceful picketing was a legitimate exercise of free speech. But here as in other cases the French Canadian jurists were allied with English-speaking jurists and it was the latter who wrote the leading judgment for their side of the case.

Thus outside of those cases involving challenges to the Quebec government's policy of curtailing freedom of religion and speech, it is a fair summary of our findings to conclude that bicultural factors do not appear to have played a decisive role in the Court's decision-making. On the whole, the Court's decision-making in most of the controversial areas of public law has either been so lacking in any degree of collegiality that it is impossible to detect any meaningful alliances among the judges, or else, where alliances have been fairly well demarcated, they have included both French-speaking and English-speaking members of the Court. As for the general style or philosophy of jurisprudence, the Quebec members of the Court have shown that they are content to accept the traditional positivist approach which, with the exception of some notable flourishes (especially by Justice Rand) in the direction of "judicial statesmanship," has been adopted by most of their common-law brethren.

As a closing note to this chapter we should acknowledge that one body of decisions which we did not single out for detailed analysis is that group of Quebec appeals dealing with Quebec's Civil Code or other phases of that province's distinctive legal system. For the Quebec jurist this is likely the area of the Supreme Court's decision-making in which he anticipates the most serious instances of bicultural cleavage between the Supreme Court's civilian and common-law judges and, even more, between the Supreme Court as a whole and

Quebec's highest court of last resort. Our omission from this chapter of cases dealing with important questions relating to Quebec's civil law does not mean that we do not regard such cases as an important source of the cultural differences in the Supreme Court's work, but rather it stems as we have stated before, from the limitations of our own time and skills. To explore this area thoroughly and sensitively would require a separate study carried out by professional lawyers well versed in both legal traditions. Our main contribution to this phase of biculturalism in the Supreme Court's decision-making has been by way of our quantitative study.

However, in this chapter, while looking at leading cases relating to civil liberties and family relations, we explored some of the most publicized cases in which a "common-law" majority of the Supreme Court overruled the civilian minority as well as the Quebec appeal court on a question which was concerned, *inter alia*, with a provision of Quebec's Civil Code or Code of Procedure. The three cases in which this occurred were *Taillon v. Donaldson*, dealing with the custody of children and the *Roncarelli* and *Lamb* cases in which civil actions were brought against Quebec public officers. Without going into the question of whether the common-law judges' decisions in these cases was "alien" to the spirit and substance of Quebec's civil law, the one aspect of these decisions which is clear is that the division of opinion involved more than a mere conflict in the interpretation of legal rules. In each case the interpretation of the Quebec law favoured by the civilian judges carried with it either positively or negatively a moral or political outlook not shared by the Supreme Court majority—in the *Taillon* case, the natural law conception of the sanctity of the family and in the *Roncarelli* and *Lamb* cases, at least a rejection of the Rule of Law norms as implicit conditions attached to the exercise of public power in Quebec. This suggests that Quebec's civil law as interpreted by the majority of Quebec civilian jurists can serve, as has so often been claimed, as a reservoir of distinctive cultural values—values which may not be shared and may even be rejected by the majority of judges on the Supreme Court of Canada. Of course, whether those values are in keeping with the main trends of opinion and culture in French Canada is another question; as is the question of whether, if these values shored up in the civil law by its professional custodians are out of step with Quebec society, they are best adjusted to changing conditions by the Supreme Court of Canada or by legislative and political agencies in Quebec.

In each section of this study we have stated the basic outcome of our inquiry into bilingual and bicultural aspects of the Supreme Court. In particular in chapters III to V we have summed up our findings at various points on the main issues of bilingual or bicultural concern pertaining to the Court's personnel, procedures and decision-making, focusing throughout on the post-1949 period. Here we wish to draw together the various strands of our study in order to see what implications our findings have for the central concerns which Canadians have had about the Court.

The easiest place to begin is with bilingualism in the Court. Here the evidence is clear that by any reasonable measure of bilingualism, the Court has failed. Although according to Section 133 of the B.N.A. Act French, *de jure*, has equal status with English as an official language of the Court, *de facto*, the operating conditions in the Court are such that French-speaking people are under a strong inducement to use English when appearing before it. Nor in communicating its judgments to the larger public outside the Court, has it systematically and thoroughly endeavoured to make its reports as accessible to French-speaking Canadians as they are to English-speaking Canadians. The Court in both its personnel and its procedures is still today primarily an English-speaking institution.

While there can be no doubt about the Supreme Court's failure to achieve a reasonable degree of bilingualism, it is also clear that up to the present this failure has generated relatively little discontent, even among Quebec lawyers and jurists. This relative lack of discontent reflects the extent to which both the French-speaking jurists and counsel who have worked in the Court have been assimilated into the English-speaking culture. But, given the current mood of French-speaking Quebecers, especially those who belong to the middle and professional classes, it would seem doubtful that French-speaking lawyers will in the future continue to be assimilated on the same scale and acquiesce so readily in a final court of appeal which functions primarily as an English-speaking institution. Already, as our poll of French-speaking Quebec lawyers revealed, even among French-



speaking Supreme Court counsel who are fluent in English, there are a significant number who object on the basis of principle rather than inconvenience to a situation which they feel makes it incumbent on them to plead their cases in English, if they are to maximize their client's chances of winning. But even if there was not the likelihood that the Court's English-speaking character would in the future seriously erode the acquiescence of French-speaking Canadians in the Supreme Court as their last court of appeal, one might still argue that to fail to take immediate steps to strengthen the Court's bilingual capacities would be to miss an opportunity to develop the Supreme Court as one of those national institutions which is equally meaningful and responsive to both English-speaking and French-speaking Canadians.

In chapter III we canvassed a broad range of possible reforms relating to the Court's personnel,<sup>1</sup> the various stages in the decision-making procedures,<sup>2</sup> and the publication of its decisions.<sup>3</sup> In support of the specific reasons advanced for these reforms we would like to emphasize two general considerations. First, as we pointed out in examining a number of these reforms, some of the changes designed to increase the Court's bilingual qualities might promote general improvements in the Court's effectiveness to act as the nation's highest tribunal for the resolution of issues of fundamental importance to the country's public law. For instance, the greater reliance on written materials rather than oral arguments, the use of bilingual law clerks, the development of more systematic conference procedures and the expansion of the time and effort devoted to researching the policy and legal implications of important cases, all of which would make it easier for the Court to handle cases in both languages, would also enhance the Court's ability to conduct its business in a way which would be more congenial to the advocates of "judicial statesmanship."<sup>4</sup> This is an important point for it must be borne in mind when considering any reform proposed to serve the interests of bilingualism or biculturalism that the Supreme Court has other purposes to serve, other norms to satisfy. When, however, it can be shown that such proposals not only are consistent with, but positively enhance, other improvements desired by a significant segment of the Court's professional critics, this should certainly increase their attractiveness.

A second general point we would make in support of the desirability of implementing reforms of the Court is that, even if some of the more extreme proposals for reducing the control of English-speaking, common-law members of the Supreme Court over Quebec's civil law were adopted, the need for a bilingual national court to deal with matters which are clearly of national importance would remain. The two approaches to reform of the Supreme Court which have been most widely considered by the Court's civilian critics in Quebec are the termination of all appeals to the Supreme Court from Quebec's highest court of last resort in matters pertaining to Quebec's local law, or the establishment on either a permanent or *ad hoc* basis of a specialized chamber of the Court in which civilian jurists would be guaranteed a controlling influence in the disposition of Quebec appeals

concerning that province's civil law. But the proponents of both these approaches have assumed that if their respective schemes were carried into effect there would still be a need for a federal appellate court manned by jurists from both English-speaking and French-speaking Canada to adjudicate questions of national significance. If the services of such a national tribunal are to be shared on an equal basis by both French-speaking and English-speaking Canadians, changes must be made in either the Supreme Court's personnel or its method of conducting its business or both which will make it as convenient for French-speaking Canadians to use their native language in the Court as it is for English-speaking Canadians to plead their cases in English.

Now, turning to the bicultural as distinguished from the bilingual aspects of the Court, it is more difficult to derive clear-cut conclusions from our findings. This no doubt is to be expected. It is difficult to work out a concept of "biculturalism" which either as a political value or a sociological concept can be used effectively and unambiguously in any field of inquiry. Further, in our own study, we have argued against an oversimplified use of biculturalism as a category of explanation. We have seen that it may be very misleading in substantive legal issues to assume that there are typical French or English, civil-law or common-law, points of view. Also in analyzing differences of opinion between French- and English-speaking jurists we have questioned the validity of attempts to account for these differences simply by referring to the French and English, or Roman Catholic and Protestant aspects of the judges' backgrounds.

Nevertheless we did, for purposes of analysis, identify two areas of "bicultural concern" as directives for our empirical research.<sup>5</sup> The first of these was the dualism between common law and civil law in the Supreme Court's jurisdiction. In our historical chapter we traced the civilian jurists' fear that the Supreme Court's common-law majority would adulterate Quebec's civil law by grafting common-law techniques and precepts on to it. This has undoubtedly been the most persistent source of Quebec discontent with the Supreme Court. Since the abolition of Privy Council appeals in 1949, indeed, at the *political* level, it has been a less prominent grievance than the federalist complaint against the central government's control of the tribunal which umpires the federal division of powers. But recently there has been a revival of the classical civilian protest against the Supreme Court's inadequacies and dangers as a final court of appeal for Quebec's civil law.<sup>6</sup> This protest is likely to be intensified in the future as the tempo of Quebec nationalism accelerates. For, as we stressed in our historical analysis, the fundamental basis of this protest is not a mere concern for legal purity and accuracy but a nationalist conviction that Quebec's civil-law system is an essential ingredient of its distinctive culture and as such requires for its survival judicial custodians imbued with the methods of interpretation and social values integral to that culture.<sup>7</sup>

In our detailed examination of the Court's decision-making since 1949 we did not try to gather evidence with which to test the civilian

complaint regarding the Supreme Court's tendency to transmit alien norms and techniques of construction into Quebec's civil-law system, nor indeed did we systematically examine those cases which might throw some light on the contention that the Supreme Court has erred in interpreting Quebec's Civil Code. Quebec jurists have already produced a great deal of careful scholarship in support of these contentions,<sup>8</sup> and we considered it beyond our own terms of reference to undertake a substantive study of this question. But we would also contend that, to the extent that the civilian complaint is based on a sense of nationalism, research into individual cases is irrelevant. To those who look upon the judicial interpretation of Quebec's civil law as a quasi-legislative activity capable of making a vital impact on the texture of French Canadian society the mere possibility that this activity might be controlled by judges appointed from other parts of Canada, untrained in Quebec's legal system, is sufficient grounds for condemning the existing jurisdiction and organization of the Supreme Court.

Our quantitative study did throw some light on the extent of potential "common-law" influence on Quebec's civil law. Our analysis of the workload produced by the rules governing the Court's jurisdiction showed that cases concerning private law account for the great bulk of the Court's business. This means that an overwhelming proportion of the cases which come to the Court from Quebec are essentially confined to questions related to Quebec's civil law. In our examination of the Court's disposition of provincial appeals we found that the Court was only slightly less likely to reverse Quebec's highest appellate court in appeals involving provincial law matters than the appellate courts of the other provinces. Further, in tracing the balance of power between civilian and common-law judges in Quebec appeals, we saw that whereas up to 1949, the Quebec judges were of necessity always in a minority position, after 1949, with the addition of a third Quebec judge, they constituted a majority in most Quebec appeals. Still it was evident that in a significant fraction of Quebec appeals since 1949, including some confined to the interpretation of Quebec's Civil Code, common-law judges constituted a majority or wrote the Court's judgment. We also noted that in these cases there was clearly a greater tendency for the Supreme Court to reverse the Quebec appellate court. Finally, in our analysis of voting patterns in Civil Code cases, while we found that the three civilian judges tended to form a dominant coalition, we also identified a tendency in a number of controversial cases for a coalition of common-law judges, who were relatively infrequent participants in Quebec appeals, to tilt the balance of power away from the civilian judges.

In our qualitative study of leading decisions we did see, in a number of instances, how differing approaches to Quebec's civil law by civilian and common-law judges can entail the application of different moral or political values to the interests involved in the dispute. This is particularly evident in the *Roncarelli*, *Lamb* and, to some extent, the *Chaput* cases where the common-law majority, citing English authorities, read Rule of Law precepts into the statutory powers and



civil responsibilities of Quebec public authorities. When one is asked to consider the merits of altering the Supreme Court's structure so that only civilian jurists could determine the outcome of appeals involving Quebec's civil law, it is worth remembering that under such a system it is highly unlikely that these three cases and others like them would be heard by a full Supreme Court. Whether or not one is dismayed or attracted by this prospect will depend on whether one gives a higher priority to Quebec's opportunity for self-determination in areas of law which are thought to be integral to its own culture or whether one wishes to see the common-law judges' Rule of Law idealism applied to all of Canada.

This brings us to the other dimension of bicultural concern which we have studied—the general tension or conflict in the Supreme Court's decision-making between values associated with French-speaking Canada and those associated with English-speaking Canada. Here the principal outcome of our quantitative study was to confirm that the one type of case in which there was a marked tendency for the Quebec jurists, both on the Supreme Court and the Quebec Court of Queen's Bench, to dissent from the position taken by the Supreme Court's English-speaking majority was that which involved attempts by the Quebec government of Premier Duplessis to curtail the freedom of religion and freedom of speech of unpopular religious and political minorities. However, in interpreting the results of our detailed analysis of these cases, we argued that, while the Supreme Court had undoubtedly vetoed policies which at the time were favoured by the most influential political forces in Quebec, it had also acted as the vanguard for those elements in Quebec society which were moving closer to the predominant English Canadian attitudes to civil liberties and which were in the process of challenging the more traditional forces for the leadership of Quebec opinion. We also suggested that the presence of civilian judges on the Supreme Court had the effect of shifting the position of the Court's effective majority on civil libertarian questions to a moderate position reasonably acceptable to the main components of the governing national alliance.

Although it is perhaps beyond the formal terms of reference of this study to express opinions on the merits of possible suggestions for reforming the Court, we cannot resist the opportunity of indicating the direction in which our research would prompt us to turn if we were asked to consider basic structural reform of the Supreme Court. Of the two alternative reforms which have most frequently been put forward by the Court's Quebec critics—the termination of appeals in provincial law matters or the establishment of a specialized civil-law chamber (matched presumably by a specialized common-law chamber)—we would definitely prefer the former. We would prefer it not only because such a reform would effectively meet the aspirations of the Court's staunchest opponents in Quebec but because, if applied to all the other provinces, it would, in our opinion, lead to a much more rational organization of the nation's judicial business and a much more effective and useful Supreme Court.



In short we would advocate the federalist reform<sup>9</sup> of the Supreme Court's jurisdiction which would make the provincial appeal courts the final courts of appeal in provincial law matters leaving the Supreme Court with an appellate jurisdiction confined to federal law matters only, but one which would, of course, include constitutional disputes. In our view this approach has the merit of serving the interests of both those who wish to have provincial law interpreted by tribunals which are more sensitive to the distinctive characteristics and problems of the local society and those who desire the Supreme Court of Canada to emerge as a more statesmanlike arbiter of legal disputes of significance to the whole nation. It would certainly have the effect of leaving control over the interpretation of Quebec's distinctive system of private law entirely in the hands of Quebec jurists. It would accomplish this without adding another level of appeal from five senior jurists of Quebec's appellate court to a similar number of Quebec jurists in a specialized civil-law chamber of the Supreme Court.<sup>10</sup> Also under the two chamber scheme the benefits which may result from having judges familiar with local conditions interpret provincial statutes would be confined to Quebec, whereas if the federalist approach were adopted they would be extended to all the provinces.

No doubt the removal of the Supreme Court's jurisdiction in provincial law matters would eliminate the use of the federal judiciary as an instrument for bringing about a greater uniformity of laws in Canada. But the proper instrument for achieving such uniformity in those areas of law subject to provincial jurisdiction is through the device of federal-provincial legislative co-operation as clearly envisaged in Section 94 of the B.N.A. Act. And it should be noted that it was never contemplated by the framers of that Section that Quebec would be interested in subjecting its laws relating to property and civil rights to such a homogenizing process.

Also, if one wanted the national appellate court to have the final determination of issues such as those raised in the *Chaput*, *Lamb* and *Roncarelli* cases in which fundamental principles of public law were threatened by provincial legislative or executive action, it would be necessary to arm the Supreme Court with an extensive *certiorari* jurisdiction. Possibly the most effective instrument for creating such a jurisdiction would be a constitutional Bill of Rights binding on the provinces and the federal government, and for which the Supreme Court would be the final interpreter.

The termination of appeals in provincial law matters would have the effect of leaving the Supreme Court free to concentrate its energies on national issues of public law. No doubt this change in the Court's jurisdiction would lead to an increase in the number of jurisdictional disputes it would have to handle. But this would surely be outweighed by the elimination of the great number of cases concerning petty disputes between private groups and individuals which now account for the largest part of the Court's workload. Indeed this reduction of the Court's workload would make it possible for its members to conduct a more sensitive screening of the cases which it decided to hear on

the merits. In addition, it would facilitate the hearing of important cases by all of the Court's members and provide them with more time and possibly more inspiration to carry out extensive research and concerted reflection and discussion on the issues raised by these cases.

In a way, the Supreme Court which we contemplate as a result of this reform, resembles the constitutional court which some writers<sup>11</sup> and a number of briefs to this Royal Commission have recommended. However, it differs from these proposals in two important respects. In the first place, unlike a constitutional court which would only occasionally be consulted to settle disputes over the meaning of the Constitution, the Supreme Court we envisage would be in session at least as frequently as it is now, handling the full range of issues related to the federal law and constitution. The calibre of the Court's decisions and the respect which they would inspire, would, we think, be thoroughly undermined if the Court was no more than an occasional gathering of jurists to deal with urgent constitutional questions.

Secondly, as for the mode of selecting judges, we are opposed to the suggestion which is sometimes contained in proposals for a constitutional court that Quebec and the federal government each appoint half the members of such a tribunal. In our investigation of the present system of appointments we pointed out the tendency of the federal government's tight monopoly of power over all senior judicial appointments in Canada to confine its selection to a rather small circle of provincial judges and politicians. In order to break that monopoly and also in order to increase the provinces' trust and confidence in the Court, we definitely favour provincial participation in the appointment of Supreme Court judges. However, it would be a grave mistake to divide the power of appointment between Quebec and Ottawa. Whatever the future of the Supreme Court's jurisdiction, it is bound to embrace a great host of issues which are not immediately concerned with Quebec's relationship to Ottawa or the other provinces.

It is the linguistic dimension of French culture which we feel should be given equal status in the Supreme Court, for it is this aspect of French culture which is obviously shared by all French-speaking Canadians regardless of the province in which they reside. Bilingualism can be provided for by the appointment of genuinely bilingual judges or, in lieu of that, the use of various translation devices which we have proposed in chapter III. The civil-law element in French-Canadian culture is operative only in the province of Quebec and is best sustained by leaving its development in the hands of Quebec jurists. Finally as for the dualism of French-English values in the Supreme Court's work as Canada's highest tribunal, it is our conclusion that few of the major issues which the Supreme Court is likely to face in the field of public law turn on a dichotomy of values which results from ethnic determinism. The comparative law advantages which may result from the interaction of common-law and civil-law approaches can continue to enrich the Supreme Court's jurisprudence without establishing numerical parity between the representatives of the two legal traditions. French Roman Catholic values and English Protestant values are only two of the large number of cultural forces which may affect

the opinions of Supreme Court judges. In the future, if the Court can become more corporate in its decision-making techniques it should play an even greater role than it has in the past as an integrative force, weaving together in its own consensus the outlooks and philosophies of its various members. But the primary function of the Supreme Court has not been and should not become the arbitration of differences between French and English Canada. Its prime function should be the development of a national jurisprudence which can not only be shared equally by French- and English-speaking citizens but also which is sensitive to *all* of the country's major problems including its bicultural ones.







1. *Origin and disposition of cases on the merits*

	Cases	Decision	
		Affirmed	Reversed
Supreme Court's original jurisdiction	5		
Supreme Court reference case	7		
Appeal from federal courts	173	96	77
Appeal from provincial court on leave granted by Supreme Court	173	88	85
Appeal from provincial court on leave granted by provincial court	111	55	46
Appeal as of right from provincial court	536	330	206
Appeal in <i>forma pauperis</i>	6		

2. *Motions for leave to appeal before Supreme Court*

	Motion granted	Motion denied
From federal court	2	5
From provincial court	5	16
Leave for rehearing	1	2

3. *Appeals (private or public law)*

## Appeal from:

Newfoundland	3	Ontario	248
Prince Edward Island	4	Manitoba	38
Nova Scotia	15	Saskatchewan	50
New Brunswick	28	Alberta	72
Quebec	248	British Columbia	126
		Federal court	178

*Type of Law*

Private law	668
Public law	
constitutional	30
non-constitutional	163
criminal	<u>149</u>
	342

*Disposition*

Decision affirmed	571
Decision affirmed in part	37
Decision reversed	393

4. *Dominion provincial relations (inter-governmental litigations and interventions)*

Appeal from:

Newfoundland	0	Ontario	1
Prince Edward Island	1	Manitoba	4
Nova Scotia	1	Saskatchewan	2
New Brunswick	1	Alberta	1
Quebec	0	British Columbia	1
		Federal court	3

*Disposition*

Dominion wins	5
Province wins	6
Other	4

5. *Constitutional challenges to legislation*

Source of legislation:

Newfoundland	0	Ontario	6
Prince Edward Island	1	Manitoba	3
Nova Scotia	1	Saskatchewan	6
New Brunswick	3	Alberta	3
Quebec	5	British Columbia	6
		Dominion	11

*Disposition*

Legislation upheld	28
Legislation denied in part	4
Legislation denied	12

6. *Government as a party (in public or private cases; excludes crown in criminal cases but includes other government agencies)*

	Appellant		Respondent	
	Litigant	Intervenor	Litigant	Intervenor
Newfoundland	0	1	1	0
Prince Edward Island	1	0	0	0
Nova Scotia	1	0	1	0
New Brunswick	1	0	2	1
Quebec	1	1	9	5
Ontario	4	3	5	1
Manitoba	2	0	1	3
Saskatchewan	3	1	8	0
Alberta	3	0	1	1
British Columbia	9	1	8	2
Dominion	56	10	122	11
Other	27	0	33	1

*Disposition*

Appellant wins	110
Respondent wins	178
Split decisions	15

7. *Group litigation (including interventions)*

a. *Religious identity* (clear verdict 3, no clear verdict 4, irrelevant 3)

	Wins or draws	Losses or draws
Roman Catholic	2	1
Protestant	2	0
Jewish	0	1
Jehovah's Witness	1	1
Other	0	1
No religious identity	0	1

b. *Ethnic identity* (clear verdict 1, no clear verdict 1, irrelevant 3)

	Wins or draws	Losses or draws
French	2	0
English	0	0
Other	1	0
No ethnic identity	0	2



# 8. *Interaction of private-law systems*

Jurisdiction	Decisive precedent applied:		
	Civil Code	Common Law	Both
Civil Code	162	3	15
Common Law	1	442	0

# 9. *Interaction of provincial legal systems*

	Choice	No choice
Cases involving or not choice between competing lines of provincial cases	9	1021
Province whose system applied:		
Newfoundland	1	
Prince Edward Island	1	
Nova Scotia	0	
New Brunswick	0	
Quebec	5	
Ontario	0	
Manitoba	0	
Saskatchewan	1	
Alberta	0	
British Columbia	1	
Coexistence	0	
Not applicable	0	

# 10. *Use of foreign legal systems*

	Involving reference	Not involving reference
Cases involving or not reference to legal system of:		
Any foreign country	481	549
Great Britain	445	585
France	29	1001
Australia	8	1022
Other	10	1020

11. *Bicultural issues\**

## a. Appeal from:

Newfoundland	0	Manitoba	4
Prince Edward Island	0	Saskatchewan	2
Nova Scotia	2	Alberta	2
New Brunswick	4	British Columbia	21
Quebec	21	Federal court	6
Ontario	36	Reference case	0

b. Issues	Involved in case	Not involved in case
Family relationship	17	1014
Obscenity	1	1030
Morals	5	1026
Religious beliefs	13	1018
Civil liberties	75	956
Education	5	1026
Other	4	1027
No issue	0	1031

12. *Attendance and voting of judges*

Judge	Assent	Dissent	Absent	Non-member
Rinfret	125	25	102	768
Taschereau	574	48	405	0
Fauteux	560	36	432	0
Kerwin	485	51	394	95
Cartwright	589	118	318	0
Kellock	228	17	279	499
Locke	487	80	321	132
Estey	232	20	117	650
Rand	359	47	218	399
Abbott	434	26	314	250
Spence	29	2	23	965
Judson	315	22	162	520
Hall	53	5	56	906
Nolan	49	2	65	903
Martland	319	16	169	519
Ritchie	243	12	142	623

\*For a list of the cases identified under this heading, see Appendix B, 229.

	Yes	No
13. Does this case raise a particularly vital issue which involves a significant interaction or clash of cultures?	29	1001
14. Did any of the judges use English to explain a French text?	12	1018
15. Did any of the judges use French to explain an English text?	7	1023
16. Did any English-speaking judge express himself in French	7	1023
17. Did any French-speaking judge express himself in English	130	900
18. Did any of the judges comment directly on bicultural or bilingual problems?	2	1028

*A. Family Relationship*

1. McKee v. McKee [1950] S.C.R. 700
2. Re Baby Duffell: Martin v. Duffell [1950] S.C.R. 737
3. Smith v. Smith [1952] 2 S.C.R. 312
4. Taillon v. Donaldson [1953] 2 S.C.R. 257
5. The Queen et al. v. Leong Ba Chai [1954] S.C.R. 10
6. Carnochan v. Carnochan [1955] S.C.R. 669
7. Bickley v. Bickley and Blatchley [1957] S.C.R. 329
8. Hepton et al. v. Maat et al. [1957] S.C.R. 606
9. Hellens v. Densmore [1957] S.C.R. 768
10. Re Agar: McNeilly et al. v. Agar [1958] S.C.R. 52
11. Little et al. v. Little [1958] S.C.R. 566
12. Thompson v. Thompson [1961] S.C.R. 3
13. Kruger v. Booker [1961] S.C.R. 231
14. Rochan v. Castonguay [1961] S.C.R. 359
15. Sura v. Minister of National Revenue [1962] S.C.R. 65
16. In Re Clement: Gardner et al. v. Gardner et al. [1962] S.C.R. 235
17. In Re Gage: Ketterer et al. v. Griffith et al. [1962] S.C.R. 241

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\*Cases identified by Question 11 of Questionnaire summarized in Appendix A, 227.



*B. Obscenity*

1. Brodie, Dansky and Rubin *v.* The Queen [1962] S.C.R. 681

*C. Morals*

1. Lord's Day Alliance of Canada *v.* A.-G. B.C. et al. [1959] S.C.R. 497
2. Gordon *v.* The Queen [1961] S.C.R. 592
3. Brodie, Dansky and Rubin *v.* The Queen [1962] S.C.R. 681
4. A.-G. Ont. *v.* Barfried Enterprises Ltd. [1963] S.C.R. 570
5. Dominion News & Gifts (1962) Ltd. *v.* The Queen [1964] S.C.R. 251

*D. Religious Beliefs*

1. Major *v.* Town of Beauport et al. [1951] S.C.R. 60
2. Boucher *v.* The King [1951] S.C.R. 265
3. Schara Tzedek *v.* The Royal Trust Co. [1953] 1 S.C.R. 31
4. Saumur *v.* City of Quebec [1953] 2 S.C.R. 299
5. Henry Birks & Sons (Montreal) Ltd. and Others *v.* City of Montreal and A.-G. Que. [1955] S.C.R. 799
6. Chaput *v.* Romain et al. [1955] S.C.R. 834
7. Roncarelli *v.* Duplessis [1959] S.C.R. 121
8. Lamb *v.* Benoit et al. [1959] S.C.R. 321
9. Lord's Day Alliance of Canada *v.* A.-G. B.C. et al. [1959] S.C.R. 497
10. Lieberman *v.* The Queen [1963] S.C.R. 643
11. Robertson and Rosetanni *v.* The Queen [1963] S.C.R. 651
12. Saumur et al. *v.* Procureur Général de Québec et al. [1964] S.C.R. 252
13. Winnipeg Film Society *v.* Webster [1964] S.C.R. 280

*E. Civil Liberties*

1. Miller *v.* The King [1950] S.C.R. 168
2. McKee *v.* McKee [1950] S.C.R. 700
3. Major *v.* Town of Beauport et al. [1951] S.C.R. 60

4. Noble et al. v. Alley [1951] S.C.R. 64
5. Boucher v. The King [1951] S.C.R. 265
6. Wright v. Wright [1951] S.C.R. 728
7. Williams et al. v. Aristocratic Restaurants Ltd. [1951] S.C.R. 762
8. The King v. Murakimi [1951] S.C.R. 801
9. Winner v. S.M.T. (Eastern) Ltd. [1951] S.C.R. 887
10. Picard v. Warren [1952] 2 S.C.R. 433
11. Bruschi v. The Queen [1953] S.C.R. 373
12. Kieffer v. Secretary of State of Canada [1953] 2 S.C.R. 198
13. Rathie v. Montreal Trust Company and B.C. Pulp & Paper Co. Ltd. et al. [1953] 2 S.C.R. 204
14. Piperno v. The Queen [1953] 2 S.C.R. 292
15. Poje and Others v. A.-G. B.C. [1953] 1 S.C.R. 516
16. Saumur v. City of Quebec and A.-G. Que. [1953] 2 S.C.R. 299
17. The Queen et al. v. Leon Ba Chai [1954] S.C.R. 10
18. Masella v. Langlais [1955] S.C.R. 263
19. Mehr v. The Law Society of Upper Canada [1955] S.C.R. 344
20. Narine Singh v. A.-G. Can. [1955] S.C.R. 397
21. Henry Birks and Sons (Montreal) Ltd. v. City of Montreal and A.-G. Que. [1955] S.C.R. 799
22. Chaput v. Romain et al. [1955] S.C.R. 834
23. Carroll v. City of Ottawa [1956] S.C.R. 256
24. A.-G. Can. v. Brent [1956] S.C.R. 318
25. Ross v. Lamport [1956] S.C.R. 366
26. Frei v. The Queen [1956] S.C.R. 462
27. King v. Colonial Homes Ltd. et al. [1956] S.C.R. 528
28. Francis v. The Queen [1956] S.C.R. 618
29. Parkes v. The Queen [1956] S.C.R. 768
30. Board of Health for Township of Saltfleet v. Knapman [1956] S.C.R. 877
31. Kirkland v. The Queen [1957] S.C.R. 3
32. Switzman v. Elbling and A.-G. Que. [1957] S.C.R. 285
33. Orchard et al. v. Tunney [1957] S.C.R. 436
34. Beaver v. The Queen [1957] S.C.R. 531

35. Metropolitan Toronto v. Village of Forest Hill [1957] S.C.R. 569
36. The Queen v. Neil [1957] S.C.R. 685
37. Re Duncan [1958] S.C.R. 41
38. Beatty et al. v. Kozak [1958] S.C.R. 177
39. Dennis v. The Queen [1958] S.C.R. 473
40. Re Goldhar [1958] S.C.R. 692
41. Roncarelli v. Duplessis [1959] S.C.R. 121
42. Patchett & Sons Ltd. v. Pacific Great Eastern Ry. Co. [1959] S.C.R. 271
43. Lamb v. Benoit et al. [1959] S.C.R. 321
44. Township of Scarborough v. Bondi [1959] S.C.R. 444
45. Canadian Petrofina Ltd. v. Martin et al. [1959] S.C.R. 453
46. Lord's Day Alliance of Canada v. A.-G. B.C. et al. [1959] S.C.R. 497
47. Henderson v. Johnson et al. [1959] S.C.R. 655
48. Goldhar v. The Queen [1960] S.C.R. 431
49. Louie Yuet Sun v. The Queen [1961] S.C.R. 70
50. Marshall v. The Queen [1961] S.C.R. 123
51. Rebrin v. Bird and the Minister of Citizenship and Immigration [1961] S.C.R. 376
52. Gagnon et al. v. Foundation Maritime Ltd. [1961] S.C.R. 435
53. Banks v. Globe & Mail Ltd. et al. [1961] S.C.R. 474
54. Harnish v. The Queen [1961] S.C.R. 511
55. Gordon v. The Queen [1961] S.C.R. 592
56. Seafarers' International Union v. Stern [1961] S.C.R. 682
57. A.-G. Canada v. Reader's Digest Association (Canada) Ltd. Sélection du Reader's Digest (Canada) Ltée. [1961] S.C.R. 775
58. In Re Shumiatcher [1962] S.C.R. 38
59. First Industrial Relations Ltd. et al. v. International Union of Operating Engineers Local 882 [1962] S.C.R. 80
60. Nordstrom v. Baumann [1962] S.C.R. 147
61. Canadian Fishing Co. Ltd. et al. v. Smith et al. [1962] S.C.R. 294
62. C.P.R. v. Zambri [1962] S.C.R. 609
63. Brodie, Dansky and Rubin v. The Queen [1962] S.C.R. 681
64. The Queen v. McGrath [1962] S.C.R. 739

65. Re Kinnaird and Workman's Compensation Board [1963] S.C.R. 239
66. Oil Chemical and Atomic Workers' International Union Local 16-601 v. Imperial Oil Ltd and A.-G. B.C. [1963] S.C.R. 584
67. Lieberman v. The Queen [1963] S.C.R. 643
68. Robertson and Rosetanni v. The Queen [1963] S.C.R. 651
69. Espaillat-Rodriguez v. The Queen [1964] S.C.R. 3
70. In Re Darby [1964] S.C.R. 64
71. Magda v. The Queen [1964] S.C.R. 72
72. Prince and Myron v. The Queen [1964] S.C.R. 81
73. Dominion News & Gifts (1962) Ltd. v. The Queen [1964] S.C.R. 251
74. Saumur et al. v. Procureur Général de Québec et al. [1964] S.C.R. 252
75. Winnipeg Film Society v. Webster [1964] S.C.R. 280

#### *F. Education*

1. Bouchard v. Les Commissionnaires d'Écoles [1950] S.C.R. 479
2. City of Outremont v. Protestant School Trustees [1952] 2 S.C.R. 506
3. City of Outremont v. Protestant School Trustees [1952] 2 S.C.R. 515
4. Vandebærckhove v. Township of Middleton [1962] S.C.R. 75
5. Brodie, Dansky and Rubin v. The Queen [1962] S.C.R. 681

#### *G. Other*

1. A.-G. N.S. v. A.-G. Canada and Lord Nelson Hotel Co. Ltd. [1951] S.C.R. 31
2. The King v. The Assessors of the Town of Sunnybrae et al. [1952] 2 S.C.R. 76
3. Samson v. The Queen and A.-G. Nfld. [1957] S.C.R. 832
4. A.-G. Can. v. Reader's Digest Association (Canada) Ltd. Sélection du Reader's Digest (Canada) Ltée [1961] S.C.R. 775





The following abbreviations have been used in these Notes:

*C.B.R.*—*Canadian Bar Review*;

*C.H.R.*—*Canadian Historical Review*;

*P.A.C.*—Public Archives of Canada.

## Chapter I

1. The British North America Act, 1867, 30-1 Vic., c.3, s.101. (hereafter, B.N.A. Act). Note that in the Quebec Resolutions, the General Parliament's power to establish a "General Court of Appeal for the Federated Provinces" and its power to establish "additional Courts . . . in order to the due execution of the laws of Parliament" are provided for in two separate clauses, 29 (34) and 31 respectively.
2. For details concerning the Privy Council's jurisdiction before and after Confederation see Norman Bentwich, *Privy Council Practice* (London, 1937).
3. *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces* (Quebec, 1865), 41 (hereafter *Confederation Debates*).
4. The Act of Union, 1840, 3-4 Vic., c.35, in s.47 carried over the Courts of Civil and Criminal Jurisdiction of Upper and Lower Canada into the new Province of Canada, but subject to an overriding power vested in the Legislature of the Province of Canada to make new provisions for the judicial institutions of the new colony. Macdonald presumably believed that this clause implied a power to establish a general appeal court.
5. See, for example, speech of Henri E. Taschereau, *Confederation Debates*, 896.

6. Speech delivered at Sherbrooke on "The Proposed Union of the British North American Provinces," *Montreal Gazette*, Nov. 23, 1864, 67.
7. In Sir John A. Macdonald's second Supreme Court Bill there was a provision to limit "statutory" appeals from the Supreme Court to the Judicial Committee of the Privy Council to cases involving £500 or more in which the Supreme Court granted leave. This was not, however, intended to affect what were thought of as "pre-rogative" appeals. Bill No. 48, ss. 40, 43, P.A.C., Macdonald Papers, 159.
8. Canada, House of Commons, *Debates*, 1885, 3rd Session, 5th Parl., 163.
9. *See* n.1,
10. P.A.C., Macdonald Papers, 159, Bill No. 80.
11. *Ibid.*, s.53.
12. *Ibid.*, s.56.
13. R. B. Dickey. Quoted in A. G. Doughty (ed.), "Notes on the Quebec Conference, 1864," *C.H.R.*, I (1920), 43. *See also* speech by George Brown, 43.
14. Johnathan McCully. *Ibid.*, 44.
15. *Ibid.*
16. The idea of having a judicial tribunal give the executive branch of government advisory opinions was, of course, partially based on the model of the Judicial Committee of the Privy Council which, in theory, did nothing more than render advice to the Queen. *See*, for example, Sir John A. Macdonald's explanation of advisory opinions in Canada, House of Commons, *Debates*, 1870, 3rd Session, 1st Parl., 525.
17. P.A.C., Macdonald Papers, 159, Bill No. 80, ss.50, 51.
18. Supreme Court Act, R.S.C. 1952, c.259 (as amended by R.S.C. 1952, c.335; 1956, c.40, s.55).
19. *See* Galt's speech delivered at Sherbrooke, *Montreal Gazette*, Nov. 23, 1864, 67.
20. For Sir Georges-Étienne Cartier's views on the General Court of Appeal, *see* his speech in *Confederation Debates*, 576-7.

21. Quebec Resolution No. 29 (33), *ibid.*, 1029.
22. *Confederation Debates*, 575.
23. *Ibid.*, 576.
24. *Ibid.*, 690.
25. *Ibid.*, 896-7.
26. *Ibid.*, 365-6.
27. This, for instance, seems to have been the attitude of Joseph Cauchon. *Ibid.*, 575-6.
28. *Ibid.*, 896-7.
29. The most vigorous advocate of the federalist position outside French Canada was David Mills. *See*, for example, his letter written in 1870, P.A.C., Macdonald Papers, 159, and his speech on the Bill to Establish a Supreme Court (Canada, House of Commons, *Debates*, 1875, 2nd Session, 3rd Parl., 741).
30. Bills to establish a Supreme Court were introduced twice, once in 1869 and again in 1870. The establishment of a Supreme Court was announced in the speech from the throne in the second session of 1873 and by the Mackenzie Government in the speech from the throne in 1874.
31. *See* the two most thorough accounts of events relating to the establishment of the Supreme Court: Frank H. Underhill, "Edward Blake, the Supreme Court Act and the Appeal to the Privy Council," *C.H.R.*, XIX (1938), 245-6; Frank McKinnon, "The Establishment of the Supreme Court of Canada," *C.H.R.*, XXVI (1946), 260. *See also* Donald Creighton, *John A. Macdonald: The Old Chieftain* (Toronto, 1955).
32. Canada, House of Commons, *Debates*, 1880, 2nd Session, 4th Parl., 240.
33. This point was made in a letter written by Mr. Justice Meredith, a Quebec judge, to the Department of Justice, Ottawa, Feb. 24, 1870, commenting on Macdonald's 1869 Supreme Court Bill. P.A.C., Macdonald Papers, 159.



34. The 1869 Bill provided for a seven-judge court with four judges constituting a quorum. The 1870 Bill also called for seven judges, with five constituting a quorum. Neither Bill provided for any specific provincial or regional representation on the Supreme Court's bench. But Macdonald did suggest that he favoured the policy of representing "the different bars in the different Provinces" on the Supreme Court by having two puisne judges from each of Ontario, Quebec, and the Maritimes. Under this system Quebec could have expected to have two out of seven, or, if the Chief Justice were from Quebec, three out of seven places on the Court.
35. M. Mathieu, "Le Bill de l'Hon. Sir John A. Macdonald intitulé 'Act pour établir une Cour suprême pour la Puissance du Canada,'" *La Revue légale*, I (1869), 422. (Original French: "deux juges pourront ainsi renverser le jugement de cinq juges aussi capables qu'eux.")
36. P.A.C., Macdonald Papers, 159. See especially the letter written by W. B. Richards, the Chief Justice of Ontario, who was to become the first Chief Justice of the Supreme Court of Canada.
37. *Ibid.*
38. *Crown Grain Co. v. Day* [1908] A.C.504. The Supreme Court had earlier reached a similar conclusion. See *Clarkson v. Ryan* (1890) 17 S.C.R. 251 and *Union Colliery Co. of B.C. v. A.-G. B.C.* (1897) 27 S.C.R. 637.
39. See 5.
40. P.A.C., Macdonald Papers, 159.
41. The jurisdiction vested in the Supreme Court by ss.55 and 56 of Macdonald's 1869 Bill closely paralleled the judicial power of the United States as set down in Art. III, s.2 of the American Constitution. See M. Mathieu (*La Revue légale*, I (1869), 411 ff.) setting out this parallel but arguing that there is no analogous provision in the B.N.A. Act authorizing the federal legislature to establish federal courts similar to those of the United States.
42. P.A.C., Macdonald Papers, 159.
43. *Ibid.*, Bill No. 48, ss.47, 50, 51.
44. An Act to Establish a Supreme Court, and a Court of the Exchequer, for the Dominion of Canada (1875), 38 Vic., c.11, s.17 (hereafter, Supreme Court Act, 1875).

45. *Ibid.*, s.27. Note that this possibility for provincial litigants to bypass the higher echelons of the provincial judicial hierarchy en route to the Supreme Court did not require leave of the court of highest resort in the province, nor was it subject to any monetary requirement. Both of these restrictions were later applied to appeals *per saltum*. See the Supreme Court Act, R.S.C. 1952, c.259 (as amended by R.S.C. 1952, c.335, and 1956, c.48.) Published by the Queen's Printer (Ottawa, 1961) under the title *Office Consolidations of Supreme Court Act* (hereafter Supreme Court Act, 1961).
46. Supreme Court Act, 1875, s.49.
47. *Ibid.*, s.51.
48. *Ibid.*, ss.58, 59.
49. *Ibid.*, s.3.
50. Canada, House of Commons, *Debates*, 1875, 2nd session, 3rd Parl., 1713.
51. See chap. III, 59-78, especially Table III-1, for details of provincial representation on the Supreme Court.
52. S.53 of Macdonald's first Supreme Court Bill gave the Supreme Court an exclusive original jurisdiction to determine the constitutionality of provincial laws but made no reference to judicial review of federal laws (Bill No. 80, 1869). Also his reference case provisions did not contemplate the application of judicial review to federal laws. (See 6.) It might be further noted that in commenting on the special provisions of the 1875 Act with respect to the Supreme Court's adjudication of constitutional issues, he expressed the hope that these provisions "would not erect any Court which would in any degree override the Parliament of Canada." Canada, House of Commons, *Debates*, 1875, 2nd session, 3rd Parl., 289.
53. *Ibid.*, 1870, 3rd session, 1st Parl., 525.
54. *Ibid.*, 1875, 2nd session, 3rd Parl., 286.
55. Supreme Court Act, 1875, s.52.
56. *Ibid.*, ss.54-7.
57. See, for example, statements by Fournier and Langlois. Canada, House of Commons, *Debates*, 1875, 2nd session, 3rd Parl., 755 and 934 respectively.

58. *Ibid.*, 286.
59. Irving's amendment became s.47 of the Supreme Court Act and provided that the judgment of the Supreme Court should be final except where the right to appeal to the Privy Council was granted through the exercise of the Royal prerogative. For details concerning the amendment and its consequences, see Frank H. Underhill, "Edward Blake, the Supreme Court Act and the Appeal to the Privy Council."
60. L. F. G. Baby. Canada, House of Commons, *Debates*, 1875, 2nd session, 3rd Parl., 922.
61. See, for example, speech by Henri Taschereau, *ibid.*, 739.
62. *Ibid.*, 937.
63. *Ibid.*, 944.
64. *Ibid.*, 933.
65. See, for example, proposals of H. Taschereau, *ibid.*, 969; J.-A. Ouimet, *ibid.*, 941-2; J.-A. Mousseau and E. Cimon, *ibid.*, 983.
66. *Ibid.*, 970 (see Supreme Court Act, 1875, s.4).
67. For the only major exception to this see speech by Thomas Moss, Canada, House of Commons, *Debates*, 1875, 2nd session, 3rd Parl., 750, where he argues that since Quebec's civil law was in the form of a written code, it would be easy for the Supreme Court to apply it. Moss thought, however, that the application of the Supreme Court's appellate jurisdiction to Ontario presented greater difficulties because a specialized Appeal Court had only recently been established in Ontario and it was doubtful whether another appeal court could be created for that province.
68. *Ibid.*, 741-3. But note that in the dual system of courts envisaged for Canada, legislative and judicial jurisdiction would not parallel each other as closely as in the American system, for the provincial courts would have original jurisdiction in cases involving federal laws. Edward Blake seems also to have come to favour the federal policy of making legislative and judicial jurisdictions co-extensive. See his speech in 1885, Canada, House of Commons, *Debates*, 1885, 3rd session, 5th Parl., 158.
69. See, for example, speeches by D. F. Jones, *ibid.*, 1875, 2nd session, 3rd Parl., 925-6, and later Thomas White, *ibid.*, 968.

70. Although some, like Laflamme, thought that the provincial legislatures would soon abolish appeals particularly in view of the judicial reform in England which pointed to the likelihood of a Supreme Court of Appeal replacing the House of Lords and the Privy Council. *Ibid.*, 937.
71. Jean Langlois, for instance, estimated that the minimum cost of an appeal to the Privy Council was \$4,000 whereas in the Supreme Court an appeal would probably cost \$1,000 or less. *Ibid.*, 933.
72. *Ibid.*, 936.
73. See, for example, Ouimet, *ibid.*, 970.
74. *Ibid.*, 923.
75. *Ibid.*, 924.
76. Reported in *Ottawa Times*, Mar. 30, 1868, 148 (microfilm).
77. For further discussion of this episode see William Angus, "Judicial Selection in Canada - An Historical Perspective" (paper delivered at annual meeting of Canadian Law Teachers, 1966).
78. See, for example, letter written by W. H. Kerr of the Montreal bar, read by Edward Brooks. Canada, House of Commons, *Debates*, 1881, 3rd session, 4th Parl., 1296.
79. According to Prof. Albert S. Abel, the English Law Reports for this period set out 41 judgments in Canadian cases, and of these, 34 were from Quebec. "The Role of the Supreme Court in Private Law Cases," *Alberta Law Review*, IV, (1965). See also speech of Irving giving some figures for the 25-year period prior to 1875. Canada, House of Commons, *Debates*, 1875, 2nd session, 3rd Parl., 744-5.
80. *Ibid.*, 285.
81. See Lord Cairns' Memorandum written in 1876 stating the case for the retention of Privy Council appeals, quoted in L. A. Cannon, "Some Data Relating to the Appeal to the Privy Council," *C.B.R.*, III (1925), 461-2.
82. *Ibid.*, 464.
83. Frank H. Underhill, "Edward Blake, the Supreme Court and the Appeal to the Privy Council," 260.



84. *See*, for example, Sir John A. Macdonald's candid acknowledgement of the Court's failure to win respect and confidence. Canada, House of Commons, *Debates*, 1880, 2nd session, 4th Parl., 239.
85. *See*, for instance, a discussion of the attack on the Supreme Court, staged by Hector Langevin, who was the most prominent of the Court's Conservative antagonists, in the 1878 election campaign in Rimouski, Quebec. (*Ibid.*, 247.) *See also* Laurier's reference to the Supreme Court issue in the 1878 election. (*Ibid.*, 1885, 3rd session, 5th Parl., 167.) The Supreme Court appears also to have been an issue in parts of Ontario. F. W. Stange, Conservative M.P. for North York, claimed in 1881 that the Supreme Court question "was one of great importance in the minds of almost every elector." (*Ibid.*, 1881, 3rd session, 4th Parl., 918.)
86. *See*, for instance, acknowledgements of such commitments by Auguste Landry, Conservative M.P. for Montgomery. (*Ibid.*, 1880, 2nd session, 4th Parl., 266.) Similar commitments were made by R. P. Vallee, Conservative M.P. and newspaper editor from Portneuf. (*Ibid.*, 1881, 3rd session, 4th Parl., 922.)
87. *Canada Law Journal*, XI (1875), 266.
88. Canada, House of Commons, *Debates*, 1879, 1st session, 4th Parl., 505-6.
89. For example, *see* speeches by C. W. Weldon (New Brunswick) and Blecker (P.E.I.), *ibid.*, 1881, 3rd session, 4th Parl., 920. Another well-known Maritime defence of the Court is the speech of Louis Davies, a future Supreme Court judge, *ibid.*, 1885, 3rd session, 5th Parl., 162-3.
90. In the 1875 debate, Bunster, a government supporter from Vancouver, moved an amendment to the Supreme Court Act that would have required one Supreme Court judge to come from British Columbia, *ibid.*, 1875, 2nd session, 3rd Parl., 974. Western agitation for representation on the court's bench developed again in the 1890's: *see Canada Law Journal*, XXXII (1896), 27. In 1902 the Manitoba Bar Association passed a resolution requesting a western judge on the Supreme Court. Canada, House of Commons, *Debates*, 1902, 2nd session, 9th Parl., 410.
91. Perhaps the best example of this is an editorial in the *Canada Law Journal*, XXXVIII (1902), 63, which applied the standard Quebec objection to all the provinces: "Let it be remembered, moreover, that in the Supreme Court there are never more than two judges from any one province. To these two, or perhaps to one of them, is often in effect left the criticism of those four or five judgments of men of at least equal attainments, and

having special knowledge of the law affecting their various provinces. Is it likely that a reversal under such conditions would be considered a satisfactory adjudication?"

92. For example, speech by Hector Cameron, Canada, House of Commons, *Debates*, 1879, 1st session, 4th Parl., 1383-4.
93. Prior to the appointment of David Mills, the Liberal Minister of Justice in 1902, the Ontario appointments had gone to four Ontario judges.
94. There was even some agitation to move the Supreme Court from Ottawa to Toronto. *Canada Law Journal*, XVI (1880), 99.
95. Mackenzie's motion to give Keeler's Bill the three-month hoist was defeated 120-44. Sir John A. Macdonald and James McDonald, the Minister of Justice, both opposed this motion. Canada, House of Commons, *Debates*, 1879, 1st session, 4th Parl., 1375-6.
96. For a discussion of some of these intramural quarrels see Frank MacKinnon, "The Establishment of the Supreme Court of Canada," 271. See also the shocked reaction to an outburst of squabbling in open court in *Canada Law Journal*, XXXVIII (1902), 61.
97. *Ibid.*, XVI (1880), 74-5.
98. Edward Blake was one of the first to present a thoughtful analysis of the inadequacies of the Supreme Court's method of delivering judgments. He advocated the adoption of a style closer to that of the Privy Council, but above all, stressed that "any judicial divergence of opinion on subjects not necessary to be decided should be absolutely eliminated." Canada, House of Commons, *Debates*, 1880, 2nd session, 4th Parl., 252-3.
99. Many English-speaking members of the Quebec bar did not support this traditional objection. See speech by Edward Brooks, a Sherbrooke lawyer, describing a meeting of the Montreal bar which voted 41 to 24 against Désiré Girouard's Bill. *Ibid.*, 1881, 3rd session, 4th Parl., 1296.
100. *Ibid.*, 1881, 3rd session, 4th Parl., 913. See quantitative study reported in chap. IV, 156, for actual number of cases with results such as those described by Landry.
101. One exception to this was Girouard's response to the challenge of the Minister of Justice, James McDonald, that not a single instance had been cited of the Supreme Court's failure to administer properly Quebec's Civil Code. Girouard cited one case, *Johnson v. Minister and Trustees of St. Andrew's Church, Montreal* (1877) 1 S.C.R. 235. Canada, House of Commons,

- Debates*, 1881, 3rd session, 4th Parl., 1301. It is not easy to understand why this case should have been regarded as a leading example of the adverse effects which the Supreme Court was having on the Quebec legal system. The main issue concerned the rights of a pew-holder in a Montreal Presbyterian church. The Supreme Court split three to two in favour of the pew-holder and both Quebec judges were in the majority.
102. *Ibid.*, 924.
103. *Ibid.*, 1301.
104. This was one of the principal contentions of Désiré Girouard, perhaps the outstanding Quebec jurist in the House of Commons at the time. See his speech supporting his Bill to limit the Supreme Court's jurisdiction. *Ibid.*, 1293.
105. *Ibid.*, 1879, 1st session, 4th Parl., 1591.
106. *Ibid.*, 1880, 2nd session, 4th Parl., 257.
107. *Ibid.*, 1881, 3rd session, 4th Parl., 1302. Similarly, Donald McMaster, a Montreal lawyer, expressed his faith in linguistic assimilation not bilingualism as the best means of enabling French-speaking lawyers to plead before the Supreme Court: ". . . it must be said to the credit of the members of the legal profession of French origin in the Province of Quebec that they address our courts with a grace, an elegance, and skill in the English language that put men of British origin to shame when they attempt to speak the French language." *Ibid.*, 1885, 3rd session, 5th Parl., 161.
108. R. B. Dickey, Canada, Senate, *Debates*, 1882, 4th session, 4th Parl., 245. A number of other lawyers, French- and English-speaking, made the same point; for example, George Alexander, *ibid.*, 246; and J. J. Curran, Canada, House of Commons, *Debates*, 1885, 3rd session, 5th Parl., 162.
109. Canada, Senate, *Debates*, 1882, 4th session, 4th Parl., 231-2.
110. Canada, House of Commons, *Debates*, 1885, 3rd session, 5th Parl., 164.
111. The Supreme Court's first important decisions dealing with the B.N.A. Act displayed a deep concern for upholding federal power especially in relation to trade and commerce. See especially, *Savern v. The Queen* (1878) 2 S.C.R. 70; and *City of Fredericton v. The Queen* (1880) 3 S.C.R. 505.

112. Canada, House of Commons, *Debates*, 1881, 3rd session, 4th Parl., 913.
113. *Minutes of the Proceedings in Conference of the Representatives of the Provinces in the years 1867, 1902, 1906, 1910, 1918, 1918, 1926* (Ottawa, 1926), 27.
114. (1877) 1 S.C.R. 145.
115. *Ibid.*, 195.
116. (1891) 19 S.C.R. 374.
117. *In Re Manitoba Statutes Relating to Education* (1894) 22 S.C.R. 577.
118. *Brophy v. A.-G. Man.* [1895] A.C. 202.
119. F. R. Scott, "The Privy Council and Minority Rights," *Queen's Quarterly*, XXXVII (1930), 672.
120. Norman Bentwich, *Privy Council Practice*, 6. Lord Cairns' Appellate Jurisdiction Bill of 1876 provided for four salaried Lords of Appeal who would form the nucleus of both the House of Lords and Judicial Committee of the Privy Council as the Empire's two highest courts. In 1881, another Act was passed to enable Privy Councillors who held or had held the office of Lord Justice of Appeal to be members *ipso facto* of the Judicial Committee.
121. A. J. Dicey, *Law of the Constitution* (9th ed., London, 1939), 168.
122. *Prince v. Gagnon* L.R. (1882-3) 8 A.C. 105.
123. *Per* Lord Davey in *Clergus v. Munay* [1903] A.C. 521. This would mean that where the petitioner was seeking to appeal from the Supreme Court's judgment in a case in which federal law had compelled him to go before the Supreme Court or in which he was the unsuccessful respondent before the Supreme Court, the Privy Council would be more prepared to grant leave to appeal. See Bentwich, *Privy Council Practice*, 27.
124. For a summary of these arrangements in each province see *ibid.*, 29-35.
125. Canada, House of Commons, *Debates*, 1938, 3rd session, 18th Parl., 2163.



126. Almost half of all the Privy Council's decisions on the Canadian Constitution (77 out of 159) came in cases that were appealed directly from provincial appeal courts. *See* Peter Russell, *Leading Constitutional Decisions* (Toronto, 1965), xiii.
127. For instance, the question of whether the educational rights secured for the Roman Catholic minority in Ontario under s.93 included the right to schools in which French was the language of instruction, was sent directly to the Privy Council from the Ontario Court of Appeals. The Privy Council denied that there was such a right. *Trustees of the Roman Catholic Separate Schools for the City of Ottawa v. Mackell* [1917] A.C. 62.
128. For critical analysis of the Supreme Court's policy of *stare decisis* see Gilbert D. Kennedy, "Supreme Court of Canada—~~Stare Decisis~~—Role of Canada's Final Court," *C.B.R.*, XXXIII (1955), 340 and 630. For general surveys of *stare decisis* in Canada see W. Friedmann, "Stare Decisis at Common Law and under the Civil Code of Quebec," *ibid.*, XXXI (1953), 723; and P. B. Mignault, "The Authority of Decided Cases," *ibid.*, III (1925), 1.
129. *See* Friedmann, "Stare Decisis at Common Law," 727-9; and Horace E. Read, "The Judicial Process in Common Law Canada," *C.B.R.*, XXXVII (1959), 277-8.
130. Bora Laskin, "The Supreme Court of Canada: A Final Court of Appeal of and for Canadians," *ibid.*, XXIX (1951), 1075.
131. Only two explicit statements have been made since 1949 by Supreme Court judges of their policy with respect to *stare decisis*. 1. Chief Justice Rinfret stated that, in the context of private substantive law, "It is fundamental to the due administration of justice that the authority of decisions be scrupulously respected by all Courts upon which they are binding." *Woods Manufacturing Co. Ltd. v. The King* [1951] 2 D.L.R. 475. 2. Justice Rand, in the context of constitutional law, stated that the Supreme Court possessed the same power as had the Privy Council for "revising or restating those formulations that have come down to us." *Reference Re Farm Products Marketing Act* (Ont.) [1957], 7 D.L.R. (2d) 271.
132. Demers introduced his bill for the first time in 1902. It got as far as the debate on a motion for second reading in 1903. His same bill was given first reading in 1904.
133. E. E. Leonard, Canada, House of Commons, *Debates*, 1903, 3rd session, 9th Parl., 2361.

134. For a recent example see Léon Lalonde, "Comment on the Supreme Court's decision in *Taillon v. Donaldson*," *C.B.R.*, XXXIII (1955), 950.
135. See, for example, Édouard-F. Surveyor, "Un Cas d'ingérence des lois anglais dans notre Code Civil," *Revue du Barreau*, XIII (1953), 245.
136. See, for example, Louis Baudouin, "Conflits nés de la coexistence juridique au Canada," *La Dualité Canadienne*, ed. Mason Wade (Toronto, 1960).
137. For example, Chief Justice Lacoste of Quebec, in *Vassal v. Salvas*, 5 Q.R. (1896), 357-8, expressed the following opinion of a previous Supreme Court judgment reversing one of his own Court's judgments, "We decided the same question in *Taplin & Hunt*, but our judgment was reversed by the Supreme Court. With all due respect to this Court, we believe that it has been lead into error by French jurisprudence that applies a law different from ours. . . . This decision in *Taplin & Hunt* confuses our jurisprudence. . . ." But the Quebec court considered that it was bound by this Supreme Court judgment of which it openly disapproved. (Original French: "Nous avons décidé la même question dans *Taplin & Hunt*, mais notre jugement a été renversé par la cour suprême. Nous croyons avec tout le respect dû à cette cour, qu'elle a été induite en erreur par la jurisprudence française, qui applique un droit différent du nôtre. . . . Cette décision de *Taplin & Hunt* bouleverse notre jurisprudence. . . .")
138. This point received particular stress in the writings of Professor F. P. Walton on Quebec's civil-law system. For example, see his article entitled "The Civil Law and the Common Law in Canada," *Juridical Review*, XI (1899), 282.
139. See, especially, E. Lambert and J. Wasserman, "The Case Method in Canada and the Possibilities of its Adaptation to the Civil Law," *Yale Law Review*, XXXIX (1929), 13-16.
140. Mignault, "The Authority of Decided Cases," 11.
141. Friedmann, "Stare Decisis at Common Law," 745.
142. For an interesting recent application of this view, see G. V. V. N. Nicholls' Comment on *Langlais v. Langley*, *C.H.R.*, XXIX (1951), 982.
143. See, especially, P. B. Mignault, "Le Code civil de la Province de Québec et son interprétation," *University of Toronto Law Journal*, I (1935), 104.

144. It should be noticed that expressions of this point of view invariably assume a homogeneous common-law judicial technique. Such an assumption hardly does justice to the great body of Anglo-American legal thought which, for the last few decades, has focused on alternative judicial techniques and philosophies within the common-law world.
145. For a number of examples of this *see* Mignault, "Le Code civil de la Province de Québec," 104, and Louis Baudouin, "Méthode d'interprétation judiciaire du Code civil du Québec," *Revue du Barreau*, X (1950), 397.
146. *Ibid.*, 399. (Original French: "L'organisation judiciaire a beaucoup de ressemblance avec l'organisation judiciaire britannique, tout au moins dans sa fonction essentielle, savoir la fonction du magistrat. Le magistrat dans le Québec, et au Canada, dans les autres provinces d'origine anglaise, n'est nommé qu'après un certain nombre d'années de pratique comme avocat. C'est le même système qui prévaut en Grande-Bretagne, le magistrat n'est pas comme en France un magistrat de carrière. Il y aura donc dans la fonction du magistrat des pratiques d'avocat qui vont se faire sentir notamment dans la forme de la rédaction des jugements.")
147. *Ibid.* (Original French: "À cela s'ajoute qu'au début de la Cession du Canada la majorité des magistrats chargés de rendre la justice au Québec, . . . étaient des magistrats anglais. Ils appliquèrent le droit français . . . selon des manières de penser et une méthode purement britanniques, applicables à la common law. L'habitude de rédiger des jugements sous la forme de décisions anglaises s'est perpétuée et elle devait survivre même à la promulgation du Code de procédure civile du Québec.")
148. Compare, for instance, Mignault's words—"Our judges are native to this land; they understand the Canadian manners, customs and mentality; the English judges have mainly studied and practised the English law of England; ours have based their legal education on Canadian law"—with speeches by English Canadian lawyers attacking the Privy Council's qualifications for interpreting the Canadian Constitution. (Mignault quoted by Baudouin, "Méthode d'interprétation judiciaire," 400. Original French: "Nos juges sont du terroir; ils connaissent les moeurs, les coutumes et la mentalité canadiennes; les juges anglais ont surtout étudié et pratiqué le droit anglais d'Angleterre; les nôtres ont fait du droit canadien leur éducation légale.")
149. Thibaudeau Rinfret, C.J.C., "Reminiscences from the Supreme Court of Canada," *McGill Law Journal*, III (1956), 1.

150. *Ibid.*, 2. Mr. Justice Cartwright later made the same assertion, "Reflections on the Supreme Court," *Law Library Journal*, XLV (1952), 447.
151. Mignault, "The Authority of Decided Cases," 23. Note that the contents of this article had originally been delivered as lectures to the students of the Faculty of Law, McGill University in April 1921.
152. See chap.IV, 161-8 for comments on Tables IV.28 and IV.31.
153. Albert Mayrand, "Le droit comparé et la pensée juridique canadienne," *Revue du Barreau*, XVII (1957), 2. (Original French: "La cour suprême n'est-elle pas exposé à jouer inconsciemment, sur le plan canadien le rôle d'uniformisation du droit qu'on reproche au comité judiciaire du Conseil Privé d'avoir joué sur le plan impérial?")
154. This point was recently made by Professor Pierre Azard in "La Cour Suprême du Canada et l'application du droit civil de la Province de Québec," *C.B.R.*, XLIII (1965), 553.
155. Cartwright, "Reflections on the Supreme Court," 446.
156. Baudouin, "Méthode d'interprétation judiciaire," 446. (Original French: "Cette autorité a été favorisée par le fait également que dans certaines matières du droit constitutionnel, par exemple, le Conseil Privé a pu juger tantôt en faveur des droits des provinces, lorsque le vent était à l'autonomie provinciale. . . .")
157. *Riel v. The Queen* (1885) 10 A.C. 675.
158. 51 Vic., c.43, s.5.
159. *Naden v. The King* [1926] A.C. 482.
160. For a summary of the development of these, and other objections in Canada and the other Dominions see Hector Hughes, *National Sovereignty and Judicial Autonomy in the British Commonwealth of Nations* (London, 1931), especially chaps.IV and VIII. John S. Ewart's "Judicial Appeals to the Privy Council: the Case for Discontinuing Appeals," *Queen's Quarterly*, XXXVII (1930), 456, contains a vigorous statement of Canadian complaints. See also C. G. Pierson, *Canada and the Privy Council* (London, 1960), chap.V.



161. Ewart, "Judicial Appeals to the Privy Council," 473.
162. [1935] A.C. 500.
163. *A.-G. Ont. v. A.-G. Can.* [1947] A.C. 127.
164. *Ibid.*, 154.
165. Expressions of this feeling are far too numerous to summarize but some of the more definitive were Brooke Claxton, "Social Reform and the Constitution," *Canadian Journal of Economics and Political Science*, I (1935), 409; W. P. M. Kennedy, "The British North America Act: Past and Future," *C.B.R.*, XV (1937), 485. Also, of course, this theme was woven into the argumentation of much of the Rowell-Sirois *Report* (Canada, Royal Commission on Dominion-Provincial Relations, *Report* (Ottawa, 1940), especially Bk.I, chap.IX.)
166. Cahan introduced his first Bill to abolish appeals in federal law matters in 1938. Canada, House of Commons, *Debates*, 1938, 3rd session, 18th Parl., 313. He introduced another abolition Bill in 1939 which applied to all classes of appeals from all Canadian courts. *Ibid.*, 1939, 4th session, 18th Parl., 2811.
167. See, for example, M. J. Coldwell's support for the abolition of appeals. *Ibid.*, 1949, 1st session, 21st Parl., 199-202. Also C.C.F. member F. E. Jaenicke introduced a Bill to abolish appeals to the Privy Council in 1947. *Ibid.*, 1947, 3rd session, 20th Parl., 2355.
168. V. C. MacDonald, "The Privy Council and the Canadian Constitution," *C.B.R.*, XXIX (1951), 1035.
169. Canada, Senate, *Report to the Speaker by the Parliamentary Counsel Relating to the Enactment of the British North America Act, 1867 . . .* (Ottawa, 1940), 7.
170. *Ibid.*, 12.
171. F. R. Scott's reaction typified this stream of thought. "No alterations to the B.N.A. Act," he wrote, "will ever achieve what Canadians want them to achieve if their interpretation is left to a non-Canadian judiciary," *C.B.R.*, XV (1937), 492.
172. This argument was put forward by the Judicial Committee as early as 1871 in rejecting the Australian colonies' request for the abolition of appeals. See John S. Ewart, *The Kingdom of Canada and Other Essays* (Toronto, 1908), 226.

173. Canada, House of Commons, *Debates*, 1880, 2nd session, 4th Parl., 253-4. Later Blake in part changed his mind on this point. In 1900 he explained to the British House of Commons that his Canadian experience had taught him, "That where bitter controversies had been excited, where political passions had been engendered, where considerable disputations had prevailed, where men eminent in power and politics had ranged themselves on opposite sides, it was no disadvantage, but a great advantage to have an opportunity of appealing to an external tribunal such as the Judicial Committee for the interpretation of the Constitution on such matters." United Kingdom, House of Commons, *Debates*, 1900, 7th session, 26th Parl., 774.
174. The first of these cases is referred to in n.127 above. In the second, *Roman Catholic School Trustees for Tiny v. The King* [1928] A.C. 363, the Judicial Committee rejected the claims of Ontario Roman Catholics to apply the educational rights secured under Section 93 of the B.N.A. Act to Catholic secondary schools. It should be noted that the Supreme Court split in this case on religious lines, three to three.
175. Unless, of course, it is possible to equate impartiality with a concern for provincial autonomy. Perhaps one of the most authoritative witnesses of the Privy Council's policy of upholding provincial autonomy is provided by Lord Haldane's description of his own and Lord Watson's "achievement" as custodians of Canada's Constitution. See *Juridical Review*, XI (1899), 279, and *Cambridge Law Journal*, I (1921-3), 143.
176. See, for instance, Louis-Philippe Pigeon, "The Meaning of Provincial Autonomy," *C.B.R.*, XXIX (1951), 1135.
177. This was one of seven recommendations submitted by the Canadian Bar Association in relation to the abolition of appeals and was strongly endorsed by prominent Conservatives, including Mr. Drew. Canada, House of Commons, *Debates*, 1949, 1st session, 21st Parl., 191-2.
178. *Ibid.*, 661.
179. *Ibid.*, 313-14. One of these four judges would have to be nominated by the Quebec government. *Ibid.*, 493.
180. Antonio Perrault "La Cour suprême du Canada," *Relations*, XIII (Jan. 1953), 19-20. (Original French: "La constitution canadienne est sujette à l'interprétation. Quels pouvoirs accorde-t-elle au parlement fédéral et aux parlements provinciaux? Où se trouve la ligne séparative? S'il y a conflit, la Cour suprême en décidera. Ses juges sont nommés par le gouvernement fédéral. En certains milieux, on en tire cette conclusion que

les provinces ne sont pas suffisamment protégées.")

181. Canada, House of Commons, *Debates*, 1949, 1st session, 21st Parl., 198.
182. *A.-G. Ont. v. A.-G. Can.* (1947) A.C. 154.
183. Quebec, Royal Commission of Inquiry on Constitutional Problems, *Report* (Quebec, 1956), III, Bk.1, chap.X, 289 (hereafter *Tremblay Report*).
184. E. R. Cameron, "Proposed Amendments to the Supreme Court Act," *Canadian Law Review*, III (1904), 382.
185. Laskin, "The Supreme Court of Canada," 1049.
186. But note also that in 1893 the Supreme Court Act was amended so that the Supreme Court's jurisdiction in Quebec appeals became as nearly as possible equal to that of the Privy Council. An Act respecting the Supreme and Exchequer Courts (1891), 54-5 Vic., c.25.
187. An Act respecting the Supreme Court of Ontario and the Judges thereof (1897), 60-1 Vic., c.34.
188. For a discussion of this situation *see* Cameron, "Proposed Amendments to the Supreme Court Act," 382.
189. An Act further to amend the Supreme and Exchequer Courts Act (1889), 52 Vic., c.37.
190. An Act to amend the Supreme Court Act (1920), 10-11 Geo. V, c.32.
191. Canada, House of Commons, *Debates*, 4th session, 13th Parl., 1920, 2004.
192. *Ibid.*, 2389.
193. Supreme Court Act (1961), s.41. (*Italics added*).
194. Laskin, "The Supreme Court of Canada," 1052.
195. *Ibid.*, 1053. The case referred to was *Major v. Beauport* [1951] S.C.R. 60.
196. John J. Cavarzan, "Civil Liberties and the Supreme Court: The Image and the Institution." (Master of Laws thesis, Osgoode Hall Law School, 1965), 57.

197. An Act to amend "The Supreme and Exchequer Courts Act," and to make better provision for the Trial of Claims against the Crown (1881), 50-1 Vic., c.16.
198. Supreme Court Act (1961), s.57.
199. *Ibid.*, s.55.
200. The Privy Council's decision in *A.-G. Ont. v. A.-G. Can.* [1912] A.C. 571 established the Dominion Parliament's power to authorize the reference to the Supreme Court of any question of law, or fact. Prior to this, in 1891, provision had been made for the Court to give reasons for their conclusions in reference cases (54-5 Vic., c.25). In theory the Court's decisions in reference cases are only advisory, but in practice they seem to carry the same weight as ordinary judgments. The Supreme Court has said that "in a contested case where the same questions would arise, they would no doubt be followed." *Reference Re Validity of Wartime Leasehold Regulations* [1950] 2 D.L.R. 3. Note also that in 1922 at the request of the provinces, provision was made for an appeal to the Supreme Court from the superior court of a province in cases involving a reference made under a provincial act. An Act to amend the Supreme Court Act (1922), 12-13 Geo. V, c.48.
201. Up to 1949 the federal government initiated 41 such reference cases in the Supreme Court. Over half of these were made after 1930. Since 1949 the federal government has submitted constitutional questions to the Court on eight occasions.
202. For instance, of the Court's 1031 reported decisions from 1949 to 1964, only 12 were not appeal cases.
203. Laskin, "The Supreme Court of Canada," 1050.
204. Supreme Court Act (1961), s.36.
205. An Act to amend the Supreme Court Act and the Criminal Code (1956), 4-5 Eliz. II, c.48, s.2 (Can.)
206. Glen How, "The too Limited Jurisdiction of the Supreme Court of Canada," *C.B.R.*, XXV (1947), 575.
207. Supreme Court Act (1961), s.39 also provides for *per saltum* appeals from lower courts to the Supreme Court in a restricted category of cases. *Per saltum* appeals require leave of the highest court of last resort in the province.



208. See *Coca-Cola Co. of Canada Ltd. v. Mathews* [1944] S.C.R. 385; and comments by Kerwin, C.J., in *Switzman v. Elbling and A.-G. Quebec* [1957] S.C.R. 286.
209. The classic formulation of the criteria for deciding whether a case should go to the Supreme Court was given by Mr. Justice Nesbitt of the Supreme Court of Canada in 1904: "Where, however, the case involves matter [*sic*] of public interest or some important question of law or the construction of Imperial or Dominion statutes or a conflict of provincial or Dominion authority or questions of law applicable to the whole Dominion, leave may well be granted." *Lake Erie and Detroit Ry Co. v. Marsh* (1905), 35 S.C.R. 197.
210. Supreme Court Act (1961), s.41(3).
211. Criminal Code, 1953-4 (Can.), c.51, s.597 A(a) (as enacted by 1960-1 (Can.) c.44, s.11).
212. *Ibid.*, s.597 (A)b.
213. *Ibid.*, s.597 (1).
214. *Crown Grain Co. v. Day* [1908] A.C. 504.
215. *A.-G. Ont. v. A.-G. Can.* [1947] A.C. 127.
216. The main limitation is the provinces' power to regulate civil procedure under s.92 (14) of the B.N.A. Act.
217. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), 78. For a discussion of the ramifications of this case and a comparison of the relationship between local and federal laws in various federal judicial systems, see W. J. Wagner, *The Federal States and Their Judiciary* (The Hague, 1959), chap.IX.
218. Laskin, "The Supreme Court of Canada," 1053.

## Chapter II

1. K. C. Wheare, *Federal Government* (3rd ed., London, 1955), 66.
2. The following extract from the submission made by La Presse étudiante nationale to the Royal Commission on Bilingualism and Biculturalism is fairly typical of the popular expression of this viewpoint: "In regard to those matters which concern the powers of the provinces, agreement of the local governments is required in order to amend our constitution. However. it should be noted.

that if there is total impossibility of agreement between the federal and provincial governments, the case will be referred to the Supreme Court. . . . However, the judges of the highest Court in the land are nominated by the federal government exclusively and without ratification by the provinces. . . . Hence, the powers already acquired by the provinces are, to a certain extent, as far as their existence is concerned, controlled by what in principle is a hostile authority. (Submission 240-71, No. 172, 48-9.) (Original French: "Dans les matières qui concernent les pouvoirs provinciaux, l'accord des gouvernements locaux est requis pour amender notre constitution. Toutefois, on note que, s'il y a impossibilité totale d'entente entre les gouvernements fédéral et provinciaux, le cas sera référé à la Cour Suprême. . . . Cependant, les juges de la plus haute Cour de notre pays sont nommés par le fédéral exclusivement et sans ratification par les provinces. . . . Les pouvoirs déjà acquis par les provinces sont donc, dans une certaine mesure, soumis, quant à leur existence, à une autorité hostile, en principe.")

3. Supreme Court Act, 1961, s.9(2) provides that judges automatically retire on reaching age 75.
4. Wheare, *Federal Government*, 63.
5. For an extensive analysis of the Supreme Court's captivity by Privy Council precedents in constitutional law, see F. E. Labrie, "Canadian Constitutional Interpretation and Legislative Review," *University of Toronto Law Journal*, VIII (1949-50), 298.

Chief Justice Anglin was perhaps the best example of a Supreme Court judge who differed openly with the Privy Council's interpretation of the B.N.A. Act and, in so doing, took a position more favourable to federal legislative power. See his opinion in *In Re The Board of Commerce* (1920) 60 S.C.R. 467; and his attack on Viscount Haldane's reasoning in the *Snider* case in *The King v. Eastern Terminal Elevator Co.* [1925] S.C.R. 438.

A strictly quantitative analysis makes it difficult to argue that the Supreme Court has been inherently pro-Dominion. In 13 cases concerning the division of powers the Privy Council reversed the Supreme Court's decision. In six of these the Privy Council's decision granted the provinces legislative power which had been denied by the Supreme Court (*The Manitoba Public Schools Act* case, 1892; the *Local Prohibition* case, 1896; the *Bonanza Creek* case, 1916; and three cases involving provincial tax measures—the *Fairbanks Estate*, 1928; the *Atlantic Smoke Shops* case, 1943; and *A.-G. B.C. v. Esquimalt and Nanaimo Ry. Co.* 1950). On the other hand, in four others the Privy Council invalidated provincial laws declared valid by the Supreme Court (*Cotton v. The King*, 1914; *Ottawa Separate Schools Trustees v. Ottawa Corp.* 1917; *Great West Saddlery v. The King*, 1921, and the *Winner* case of 1954). In the remaining three, Supreme Court decisions deny-

- ing the Dominion jurisdiction were overruled by the Privy Council (*The Aeronautics Reference*, 1932; *Croft v. Dunphy*, 1933; and one part of the Dominion Trade and Industry Commission Act in the "New Deal" References of 1936-7, *A.-G. Ont. v. A.-G. Can.* [1937] A.C. 405.)
6. [1952] 1 S.C.R. 292.
  7. [1957] S.C.R. 198.
  8. [1958] S.C.R. 626.
  9. For a survey of the Supreme Court's decisions on the division of powers since 1949 see Peter H. Russell, "The Supreme Court's Interpretation of the Constitution Since 1949," Paul Fox (ed.), *Politics: Canada* (1st ed., Toronto, 1962).
  10. For a discussion of some of these decisions, see W. R. Lederman, "The Concurrent Operation of Federal and Provincial Laws in Canada," *McGill Law Journal*, IX (1963), 185.
  11. See, for instance, the recommendations of the *Tremblay Report*, III, Bk.I, chap.X, 389. See also recommendations of Antonio Perrault, "La Cour suprême du Canada," *Relations*, XIII (Jan. 1953), 19-20.
  12. There is apparently some support for this position outside Quebec. See submissions of the Board of Directors of the Student Christian Movement of Canada (750-485, No. 41), and of the Communist Party of Canada (750-430, No. 159) to the R.C.B.&B.
  13. In the United States, the Senate which gives equal representation to each state must consent to the President's appointments to the Supreme Court. In West Germany, half of the 24 members of the Federal Constitutional Court are elected by the federal parliament (*Bundestag*) and half by the federal council (*Bundesrat*) which gives direct representation to the state governments. For detailed comparative studies of judicial structures of federal states, see Robert R. Bowie and Carl Friedrich (eds.), *Studies in Federalism* (Boston, 1954). Study No. 3 in this volume compares Australia, Canada, Germany, Switzerland, and the United States. Also W. J. Wagner in *The Federal States and Their Judiciary* (The Hague, 1959) compares federal judicial organizations in the United States, Canada, Australia, Switzerland, Argentina, Brazil and Mexico.
  14. See 60.
  15. For instance, Henry M. Hart jr., analyzing the relations between state and federal courts in the United States, writes that "State

courts are regularly employed for the enforcement of federally-created rights having no necessary connection with state substantive law while federal courts are employed for the enforcement of state-vested rights having no necessary connection with federal substantive law." "The Relations between State and Federal Law," in A. W. MacMahon (ed.), *Federalism: Mature and Emergent* (New York, 1952), 184.

16. That is not to say, of course, that no federal courts have been established under Parliament's power in Section 101 of the B.N.A. Act to provide "additional courts for the better administration of the Laws of Canada." Among such courts are the Exchequer Court, the Board of Transport Commissioners, the Tariff Board, the Income Tax Appeal Board, and the Court Martial Appeal Court.
17. Section 96 of the B.N.A. Act.
18. Wheare, *Federal Government*, 71.
19. See Morris C. Shumiatcher, "Section 96 of the British North America Act Re-examined," *C.B.R.*, XXVII (1949), 131.
20. Albert S. Abel, "The Role of the Supreme Court in Private Law Cases," *Alberta Law Review*, IV (1966).
21. For a discussion of the Supreme Court's function in securing uniformity of law in Canada, see John Willis, "Securing Uniformity of Law in a Federal System," *University of Toronto Law Journal*, V (1944), 352. As Professor Willis acknowledges and as s.94 B.N.A. Act implies, uniformity of laws related to property and civil rights is a value which only the common-law provinces are likely to accept.
22. Submission No. 740-270 to the R.C.B.&B., 8.
23. See 21.
24. There are also, of course, Spanish elements in the Louisiana civil-law tradition.
25. Gordon Ireland, "Louisiana's Legal System Reappraised," *Tulane Law Review*, XI (1937), 596.
26. *Ibid.*, 595.
27. Sidney Herold, "The French Language and the Louisiana Lawyer," *Tulane Law Review*, V (1931), 176.



28. See the works cited above (notes 132-56, 246-9) in the historical account of French Canadian attitudes to the Court contained in Chap. I.
29. One of the scholars who has been most sensitive to this development is Prof. Edward McWhinney. See, for example, his article on "Federalism, Pluralism and State Responsibility—Canadian and American Analogies," *New York University Law Review*, XXXIV (1959), 1079. See also his *Comparative Federalism* (Toronto, 1963).
30. Horace E. Read, "The Judicial Process in Common Law Canada," *C.B.R.*, XXXVII (1959), 279-80.
31. Gilbert D. Kennedy, "Supreme Court of Canada—*Stare Decisis*—Role of Canada's Final Court," *C.B.R.*, XXXIII (1955), 340 and 632.
32. There is nevertheless little indication in Canadian literature of how judges might best acquire knowledge of societal facts, or how such knowledge might be related to the outcome of their deliberations. For a discussion of some of these questions and references to relevant American literature, see Read, "The Judicial Process in Common Law Canada," 290-1. See also Edward McWhinney, *Judicial Review in the English-Speaking World* (2nd ed., Toronto, 1960), 203-12.
33. Bora Laskin, "The Supreme Court of Canada: A Final Court of Appeal of and for Canadians," *C.B.R.*, XXIX (1951), 1047-8.
34. See 41 and 118-20.
35. See Table IV.1, 116, for a quantitative analysis of the types of cases and sources of cases on the Supreme Court's docket since 1949.
36. For a detailed examination of this tendency, see John Cavarzan, "Civil Liberties and the Supreme Court: The Image and the Institution" (Master of Laws thesis, Osgoode Hall Law School, 1965), 37-57.
37. At one time a large number of cases reached the U.S. Supreme Court as a matter of right. But a series of statutes culminating in the Judiciary Act of 1925 gave the Court a large measure of control over its own docket so that it can concentrate on crucial questions of nationwide concern.

### Chapter III

1. Supreme Court Act (1961).
2. *Ibid.*, ss. 4-9.

3. See 14.
4. An Act to amend the Supreme Court Act (1927), 17 Geo. V, c.38.
5. See, for example, A. D. Gibb, "Inter-Relation of the Legal Systems of Scotland and England," *Law Quarterly Review*, LIII (1937), 61.
6. Canada, House of Commons, *Debates*, 1949, 1st session, 21st Parl., 662-3.
7. *Canada Law Journal*, XI (1875), 266.
8. Chief Justice Rinfret, addressing the students of Osgoode Hall in 1953, stressed the efforts made by English-speaking appointees to the Court to learn French. In particular, he asserted that the three Ontario judges then serving on the Court, "... Justices Kerwin, Kellock and Cartwright, have spent long hours taking private tuition in the French language and they have attained a degree of fluency which permits them to follow the argument in that language without any difficulty whatsoever." Quoted from Thibaudeau Rinfret, C.J.C., "My 29 years on the Bench of the Supreme Court of Canada," *Chitty's Law Journal*, III (1953), 64-5.
9. Examples are Justice Ritchie in *Magda v. The Queen* [1964] S.C.R. 72; Justice Kellock in *Reference Re Regina v. Coffin* [1956] S.C.R. 191; Justice Estey in *Eaton v. Moore* [1951] S.C.R. 470; Justice Rand in *Bellavance v. Orange Crush Ltd.* [1955] S.C.R. 706; Justice Kerwin in *Robson v. The Minister of National Revenue* [1952] 2 S.C.R. 223; Justice Locke in *Greenshields v. The Queen* [1958] S.C.R. 216; Justice Judson in *Blais v. Touchet* [1963] S.C.R. 358; Justice Martland in *Union Ins. Soc. of Canton Ltd. v. Arsenault* [1961] S.C.R. 766; Justice Cartwright in *Roncarelli v. Duplessis* [1959] S.C.R. 121; Justice Spence in *Ratté v. Provencher* [1964] S.C.R. 606.
10. See 65.
11. Canada, House of Commons, *Debates*, 1949, 1st session, 21st Parl., 663.
12. *Ibid.*, 664.
13. From 1950 to 1964 there were 286 western appeals resulting in recorded decisions as compared with 248 from each of Ontario and Quebec. During the same period there were 50 appeals from the Atlantic provinces.

14. The low levels of participation recorded for Justices Nolan, Hall and Spence are mainly the result of the short duration of their terms. Justice Nolan died a year after his appointment to the Court; Justices Hall and Spence began their terms shortly before the end of our period. A large number of the judgments reported during a judge's first session on the Court are based on cases heard at an earlier session. Consequently, if a judge's freshman session represents a large part of his total time on the Court, his over-all percentage of participation in the Court's reported decisions will be low.
15. There are some exceptions to this. In cases decided on the merits, four judges can constitute a quorum if both parties consent or if a judge is disqualified because he was a member of the lower court from which the appeal comes. The Supreme Court Act (1961), ss.29 and 28(2). Also one judge can issue a writ of habeas corpus and three judges constitute a quorum to hear an application for leave to appeal to the Supreme Court, except in capital cases, where five judges are required. Supreme Court Act (1961), c.259, ss.57 (1) and 44A.
16. Stuart Garson, Canada, House of Commons, *Debates*, 1949, 1st session, 21st Parl., 663.
17. This reform was suggested by Léon Lalande in "Audition des appels de Québec à la Cour Suprême," *C.B.R.*, XXXIII (1955), 1105. In Lalande's scheme the Chief Justice, or, in his absence, the senior puisne judge would decide whether such an *ad hoc* appointment should be made. A more drastic reform in the same direction would be to divide the Court, for at least private law matters, into civil-law and common-law chambers. This proposal was made by Professor Albert Mayrand in "Le droit comparé et la pensée juridique canadienne," *Revue du Barreau*, XXVII (1957), 2. On the basis of our quantitative study we estimate that such *ad hoc* appointments would have to be made for about five or six decisions each year.
18. See Supreme Court Act (1961), s.30.
19. See Table III.3, 67 for a statistical analysis of the Court's case load from 1950 to 1964.
20. Bora Laskin has strongly urged "That the full bench must sit in all constitutional cases and, perhaps, also in all capital cases." "The Supreme Court of Canada: A Final Court of Appeal of and for Canadians," *C.B.R.*, XXIX (1951), 1044.
21. With the exception, of course, of the Court's first Chief Justice, Sir William Buell Richards, who, nevertheless, was Chief Justice of Ontario at the time of his appointment to the

Chief Justiceship of the Supreme Court. Also there is some evidence to suggest that Prime Minister Mackenzie King considered appointing one of his cabinet colleagues to succeed Chief Justice Duff. *See* 74.

22. Supreme Court Act (1961), s.34.
23. *Ibid.*, s.30(1).
24. *Ibid.*, s.84.
25. John P. Frank, *Marble Palace* (New York, 1958), 75.
26. *See* 89-91 for a more detailed account of the Supreme Court's conference system.
27. Professor William Angus has recently provided a well-documented account of the general pattern of judicial selection in Canada with special emphasis on the continuing presence of political patronage. *See* his "Judicial Selection in Canada-The Historical Perspective" (paper read to the annual meeting of the Canadian Law Teachers, June, 1966).
28. For an exhaustive documented analysis of all the forces at work in the process of appointing one United States Supreme Court Justice *see* David J. Danelski, *A Supreme Court Judge is Appointed* (New York, 1964). In Canada there has been no documented investigation of federal judicial appointments.
29. The biographical data used here were extracted from the short biographical notes on each Supreme Court judge available in the Supreme Court library.
30. The 10 exceptions were Justices Sedgwick, Nesbit, Mignault, Newcombe, Hughes, Locke, Cartwright, Nolan, Martland and Ritchie.
31. Chief Justice Richards (Ont.), Justices Henry (N.S.), King (N.B.), Lamont (Sask.), Rand (N.B.) and Estey (Sask.).
32. Justices Fournier and Mills and Chief Justice Fitzpatrick.
33. Justice Fournier exchanged the Justice portfolio for that of Postmaster-General a few months before his elevation to the bench.
34. Justice Davies (Minister of Marine and Fisheries), Justice Brodeur (Speaker, Minister of Internal Revenue, Minister of Fisheries) and Justice Abbott (Minister of Finance).
35. Justice Davies (P.E.I.) and Justice King (N.B.).



36. The one exception was Justice King, a Conservative appointment.
37. For an account of the political character of the Mackenzie Government's first appointments, *see* 17-18.
38. A case in point was the appointment of Justice Locke in 1947. Under the headline "Mr. King Names B.C. Tory to Canada Supreme Court," Robert Taylor in the *Toronto Daily Star* reported that: "The new judge was one of the most prominent Progressive Conservatives in his home city of Vancouver and his selection by the King government caused some stir. Cabinet sources in Ottawa explained that there is in Canada such a limited number of qualified men available for such high posts that seldom does the political faith of an appointee enter into the question of his selection." *Toronto Daily Star*, October 2, 1947, 2.
39. A few of these appointees, however, were known to have had close connections with federal political leaders.
40. The present Chief Justice, Taschereau, was Professor of Criminal Law at Laval University from 1929 to 1940 (from 1930 to 1940 he was also a Liberal member for Bellechasse in the Quebec Legislative Assembly); Justice Estey lectured in Law at the University of Saskatchewan; Justice Fauteux was Professor of Criminal Law at McGill from 1936 to 1950; Justice Martland had been a Professor in the University of Alberta's Law Faculty; Justice Ritchie was a lecturer in the Dalhousie Law School from 1947 to 1959.
41. Justice Mills had held the chair of Constitutional and International Law at the University of Toronto; Chief Justice Rinfret was for 10 years a Professor at the McGill Law School.
42. These criticisms are well summarized by Professor William Angus in a recent article in *Chitty's Law Journal* reprinted in the *Toronto Globe and Mail*, Oct. 22, 1965, under the title "Seeking a Way to Find Better Judges." *See also* his "Judicial Selection in Canada—The Historical Perspective."
43. Quoted in J. W. Pickersgill, *The Mackenzie King Record* (Toronto, 1960), 75.
44. *See* 46.
45. The present Chief Justice, Taschereau, is the one exception.
46. O. M. Biggar, "The Selection of Judges," *C.B.R.*, XI (1933), 39.
47. Besides Biggar's article cited above two other articles explore some of the reasons: Mr. Justice Trueman, "Judicial Appoint-

ments," *C.B.R.*, VIII (1930), 11; editorial in *Fortnightly Law Journal*, XII (1942), 65. Salaries are usually cited among the reasons for lawyers' reluctance to accept judicial appointments. Although with the present Supreme Court salary schedule of \$40,000 for the Chief Justice and \$35,000 for the puisne judges (compared with £12,000 for the Lord Chancellor and £9,000 for Lord of Appeal in Ordinary in Great Britain; £10,000 and £8,500 for the Chief Justice and High Court Justices respectively in Australia; and \$40,000 and \$39,500 for the Chief Justice and Associate Justices respectively in the U.S.A.) it would seem unlikely that salaries are a major factor in lawyers' refusal to accept Supreme Court appointments, or, if they are, then they perhaps discourage lawyers who are not by temperament well suited for service on the nation's highest judicial tribunal.

48. Quoted in William Angus, "Seeking a Way to Find Better Judges."
49. For example, Justice Hall, a Roman Catholic, was appointed just prior to the retirement of Chief Justice Kerwin who had been, until Hall's appointment, the only non-Quebec Catholic on the Court.
50. To date the only ethnic divisions of the population represented on the Court have been French and Anglo-Saxon.
51. Supreme Court Act (1961), ss.15-17.
52. The other editor is Mills Shipley.
53. Note that both the Chief Justice of the High Court of Ontario and the Chief Justice of Ontario now have law clerks.
54. Although it is true that high court judges in the United Kingdom do not have law clerks, the law reporters there have very extensive responsibilities in preparing opinions for final publication. For a recent comparison of the work of law clerks and law reporters by a team of Anglo-American jurists see Delmar Karlen, *Appellate Courts in the United States and England* (New York, 1963), 145-6.
55. This particular complaint was heard much more in the Court's earliest years, see 21. In recent years it has been heard again as one of the specific grounds for French Canadian discontent with federal institutions, see 50-2.
56. Laskin, "The Supreme Court of Canada" 1043.

57. The Supreme Court Act (1961), authorizes the judges of the Court (or any five of them) to make the Rules. The Act and Rules are printed in both languages in: *Office Consolidation of Supreme Court Act and Rules of the Supreme Court of Canada* (Ottawa, 1961).
58. To date the most thorough published account of the Supreme Court's methods of adjudication is contained in the article by Bora Laskin (*see* n.20 above). We have also been greatly assisted by Professor Albert Abel's comparative study, "The Role of the Supreme Court in Private Law Cases," *Alberta Law Review*, IV (1965).
59. We would like to record here our very deep appreciation for the friendly and helpful co-operation which we received from the Chief Justice, his fellow judges, the Registrar and Deputy Registrar in carrying out this study of the Court's operations. We hope that whatever is presented here by way of description is consistent with the explanations of the Court's methods which they offered us. Our assessment of these methods is, of course, our own.
60. Supreme Court Act (1961), s.67.
61. Rules 6 to 13, *Rules of the Supreme Court of Canada, 1945, as amended to 2 January, 1961* (Ottawa, 1961), hereafter *Supreme Court Rules, 1961*.
62. Thirty copies must be deposited in a reference case.
63. Rules 29 to 36, *Supreme Court Rules, 1961*.
64. Thirty copies must be deposited in a reference case.
65. For a critical analysis of this practice see F. Heaps, "Factums in the Supreme Court of Canada," *C.B.R.*, XV (1937), 561.
66. These figures are based on a list of Quebec cases prepared for this study by K. J. Matheson, the Supreme Court Registrar.
67. Rules 64 and 65. These rules are printed in Robert Cassels (ed.), *Manual of Procedure in the Supreme and Exchequer Courts of Canada* (Toronto, 1877), 179-202.
68. Note that in the International Court of Justice at The Hague the Registrar prepares unofficial translations of materials for the use of the Court and the parties when the parties elect to plead in different languages. But this is mainly for the benefit of the parties, for the Court's judges are expected to be familiar with the Court's two official languages, French and English.

See article 39 of the Statute establishing the Court and discussion of it in Shabtai Rosenne, *The International Court of Justice* (Leyden, 1957), 122.

69. Note, however, that briefs were usually prepared for the Judicial Committee of the Privy Council.
70. For a very thorough and authoritative comparison of the procedures followed in American and British appellate courts see Karlen, *Appellate Courts*.
71. But the Supreme Court has shown some hostility to factums which are of inordinate length. In *Saumur v. City of Quebec and A.-G. Que.* [1953] 2 S.C.R. 299, the lawyer for the Jehovah's Witnesses prepared a two-volume brief running to 912 pages. Although the Court allowed Saumur's appeal, Chief Justice Kerwin ruled that the appellant was not entitled to the costs of preparing his factum.
72. It is this study which served as the basis for Karlen's *Appellate Courts*.
73. *Ibid.*, 156-8.
74. For discussion of the reference case in the Canadian legal system see J.A.G. Grant, "Judicial Review in Canada: Procedural Aspects," *C.B.R.*, XLII (1964), 195; and G. Rubin, "The Nature, Use and Effect of Reference Cases in Canadian Constitutional Law," *McGill Law Journal*, VI (1959-60), 168.
75. Of course, another way of approaching this problem would be to reduce the Court's case load by eliminating those appeals which do not raise important issues. Professor McWhinney has argued that: "The amount and complexity of the business before the Canadian Supreme Court is now approaching the stage where the court must either, as the United States Supreme Court did years before, devise some permissible limits to the number of matters that the court must take, or else cease to be able to perform its main functions intelligently and usefully. It is a matter, really, of adequate time and opportunity for judicial research prior to the arriving at decision, and, more important, of adequate time for judicial reflection on great policy issues." *Canadian Jurisprudence* (Toronto, 1958), 17-18.
76. Karlen, *Appellate Courts*, 126.
77. This is based on estimates by the Court's officials. Also Justice Cartwright has said, ". . . some cases take a matter of several days and it is unusual for a case to finish in less than a day." "The Supreme Court of Canada," *Law Library Journal*, XLV (1952), 441.



78. See 41 and 57 for a discussion of this phase of the Supreme Court's jurisdiction; and see 118-20 for a quantitative analysis of the role of appeals as of right in the Court's work load.
79. Rule 38, *Supreme Court Rules*, 1961.
80. Rule 29 of the *Supreme Court Rules*, 1961 stipulates that factums must be filed 15 days before the first day of the session at which the appeal is to be heard.
81. See 79.
82. Only one of the French-speaking lawyers acknowledged that the language problem had ever prompted him to associate himself with an English-speaking lawyer when taking a case to the Supreme Court.
83. Note that there is no Court record of the language in which a hearing is conducted.
84. Article 116 of the Federal Constitution of Switzerland declares that "German, French, Italian and Romanche are the national languages of Switzerland," whereas German, French and Italian are the "official languages of the Confederation."
85. Christopher Hughes, *The Federal Constitution of Switzerland* (Oxford, 1954), 120.
86. William G. Rice, *Law among States in Federacy* (Wisconsin, 1959), 113.
87. The Statute and Rules of the International Court of Justice are printed and discussed in Rosenne, *The International Court*.
88. *Ibid.*, 395. Note that Article 39(3) of the Statute also calls for translations into one of the official languages when a party is granted permission to use some language other than French or English. In this situation Article 58(2) of the Rules stipulates that the party must provide the translation.
89. Karlen, *Appellate Courts*, 71-2.
90. *Ibid.*, 127.
91. See 30.
92. Professor McWhinney has been foremost among English-speaking jurists in emphasizing the comparative law advantages to be reaped from the Supreme Court's situation—advantages which he has described as "The inestimable benefits, in a plural society

of full and constant exposure to the problems from both main streams of law." *Canadian Jurisprudence*, 18-19.

93. Mayrand, "Le droit comparé et la pensée juridique canadienne," 2. (Original French of quotation: "l'une de common law et l'autre de droit civil, ou, encore exiger que les affaires de droit civil soient entendues devant une majorité de juges civilistes.") Note that Professor Mayrand certainly favours the development of comparative law techniques in Canadian jurisprudence but argues that comparative law, rather than resulting in thoughtless imitation should reinforce the "particular nature of each judicial system by emphasizing its basic character." (Original French: "le particularisme de chaque système juridique en mettant en relief ses caractères fondamentaux.") *Ibid.* 3.
94. Laskin, "The Supreme Court of Canada," 1048.
95. See the editorial complaint of this practice made in *The Canada Law Journal*, XXXVIII (1902), 61. See also 20.
96. Professor Abel in his own study shows that the Supreme Court of Canada produces an "opinion of the court" more often than the United States Supreme Court. He has made a comparative study of procedures in the highest appellate courts of Great Britain, Canada and the United States. "The Role of the Supreme Court in Private Law Cases," *Alberta Law Review*, IV (1965).
97. For an interesting comparison of opinion-writing techniques in different English-speaking jurisdictions see Edward McWhinney, "Judicial Concurrences and Dissents: A Comparative View of Opinion-writing in Final Appellate Tribunals," *C.B.R.*, XXXI (1953), 595. Professor McWhinney contends that the bicultural nature of the Supreme Court of Canada provides a strong reason for that Court's endeavouring to produce single opinions.
98. Note that s.26 of the Supreme Court Act states that, "It is not necessary for all the judges who have heard the argument in any case to be present in order to constitute the Court for delivery of judgment in that case, but in the absence of any judge from illness or any other cause, judgment may be delivered by a majority of the judges who were present at the hearing." *The Supreme Court Act* (1961), s.26.
99. Although according to Rule 40(b), "counsel representing the parties will be expected to attend upon the pronouncement of judgment, and in default of such attendance the pronouncement of judgment may be deferred." *Supreme Court Rules*, 1961.
100. Supreme Court Act (1961), s.17.

101. Supreme Court judgments are reported in a number of other general series such as the *Dominion Law Reports* and the *Annuaire de Jurisprudence du Québec* and such specialized series as *Canadian Labour Law Cases*, *Dominion Tax Cases*, *Canadian Criminal Cases*, *Criminal Reports*, *Canadian Insurance Reporter* and the *Canadian Bankruptcy Reports*.
102. This corresponds with the practice of the House of Lords and Privy Council which publish about 75 per cent of their decisions, whereas the United States Supreme Court would publish nearly all its decisions. See Karlen, *Appellate Courts*. Note that when, in addition to the Supreme Court's decisions on the merits, its decisions on granting leave to appeal (on "motions") are taken into account, only about half its decisions are reported.
103. See 115-16 for further discussion of the Supreme Court's policy in reporting decisions.
104. For description of the Quebec courts' acceptance of *stare decisis* with respect to Supreme Court decisions, see W. Friedmann, "Stare Decisis at Common Law and under the Civil Code of Quebec," *C.B.R.*, XXXI (1953), 723; and P. B. Mignault, "The Authority of Decided Cases," *C.B.R.*, III (1925), 1.
105. See 61-2 for a more detailed account of the linguistic capacities of the Court's members and the languages used in writing opinions during the post-1949 period.
106. See Tables IV.33 and IV.34, for a quantitative analysis of opinion-writing in Quebec appeal cases.
107. *Canada Law Journal*, XIII (1877), 341-2.
108. We found nine cases in which a judgment written in French is accompanied by an English translation: *Brassard et al. v. Longevin* (1877) 1 S.C.R. 188; *Caverhill v. Robillard* (1879) 2 S.C.R. 584 (J. T. Taschereau); *Severn v. The Queen* (1879) 2 S.C.R. 115; *Valin v. Langlois* (1886) 3 S.C.R. 36; *Citizens' and The Queen Ins. Cos. v. Parsons* (1880) 4 S.C.R. 253; *The Queen v. Belleau* (1883) 7 S.C.R. 56; *The Queen v. McLeod* (1884) 8 S.C.R. 29; *The Queen v. Dunn* (1886) 11 S.C.R. 387 (Fournier); *The Queen v. Doutre* (1882) 6 S.C.R. 400 (H. E. Taschereau).
109. The cases selected for French head-notes the year before were not confined to Quebec legal issues. Two were criminal law and one raised a question of conflict of laws.
110. One of these was an appeal from the Exchequer Court, but concerned a Quebec lawsuit.

111. One is not a translation of the other. The Deputy Registrar prepared both versions, writing each one separately.
112. One of these was *Saumur et al. v. Procureur Général de Québec et al.* [1964] S.C.R. 252, which involves the most recent (and abortive) attempt of the Jehovah's Witnesses to challenge the constitutional validity of Quebec's Freedom of Worship Act.
113. Our examination stopped at the end of Part VI of the 1965 volume, 440.
114. The Ontario case was *Gordon v. The Queen* [1961] S.C.R. 592, and involved a question of procedure under the Criminal Code.
115. The exception was *Gagnon v. La Commission des valeurs mobilières du Québec et al.* [1965] S.C.R. 73 and it was essentially concerned with Quebec's code of civil procedure.
116. [1965] S.C.R. 12.
117. Besides the *Dominion Law Reports* (Canada Law Book Co., Toronto), the *Criminal Reports* (Carswell Co., Toronto) and *Canadian Labour Law Cases* and *Dominion Tax Cases* (Commerce Clearing House Toronto) have provided English translations of Supreme Court judgments written in French.
118. The *Annuaire de jurisprudence du Québec* (Wilson et Lafleur, Québec) contains summaries of important Supreme Court decisions. But the digest notes most English judgments in English.
119. Rosenne, *International Court*, 417, fn.1.
120. S.22 of the Supreme Court Act states that, "All persons who are barristers or advocates in any of the provinces of Canada may practise as barristers, advocates and counsel in the Supreme Court." Supreme Court Act (1961), s.22.
121. Twenty-four described themselves as "fully bilingual" and 15 described themselves as "fairly bilingual." Only one lawyer admitted to being "slightly bilingual."
122. A number of the lawyers who answered the questionnaire added notes or memoranda in which they developed their views regarding the Supreme Court's inadequacies both as a bilingual and a bi-cultural institution.
123. Of course, it is probably true that the larger law firms naturally attract most of the Supreme Court business.



124. On the questionnaire the criterion of a specialist was stipulated as one who does half his work in a particular branch of law.
125. See 68.
126. "Has the language problem ever caused your firm to drop a case which it would otherwise have taken on appeal to the Supreme Court?"
127. "Has the language problem ever made you reluctant to advise a client to appeal a case to the Supreme Court?" We should note that several in memoranda attached to their questionnaires stated that their assessment of the Court's low facility in civil-law matters had made them reluctant to take appeals to the Supreme Court.
128. "When taking cases in the Supreme Court have you experienced any language difficulty in your dealings with the administrative staff of the Court?"
129. One lawyer did not answer this question.
130. "Do you think that the present practice of producing the headnotes for some cases in both languages is used in enough cases?"
131. This question was divided into three parts as follows:
  - a) In recent years have you tended to present more of your cases in French before the Supreme Court?  
Yes    No
  - b) Or have you in recent years tended to use English more often before the Supreme Court?  
Yes    No
  - c) If the answer to either a) or b) is yes, to what do you attribute this change?  
Change in the Court  
Change in your own language capabilities  
Other factors (please specify).
132. These questions are given in detail on 102-3.
133. Table III.3, 67 shows that most of the cases heard by more than five judges deal with criminal law or constitutional law.

## Chapter IV

1. The questionnaire was applied by John Cavarzan, a graduate of the University of Ottawa Law School, then a Master of Laws candidate at Osgoode Hall Law School, now on the faculty of the University

of Manitoba Law School. Mr. Cavarzan was directed in his work by the author and Professor Harry Arthurs of Osgoode Hall Law School.

2. For a review of some of the most prominent social science approaches to the study of the judicial process, see "A Symposium: Social Science Approaches to the Judicial Process," *Harvard Law Review*, LXXIX (1966), 1551.
3. There is nothing in Canada analogous to the Administrative Office of the United States Courts which provides comprehensive statistics on the work of the U.S. federal courts. The Registrar of the Supreme Court of Canada, on an *ad hoc* basis, does occasionally compile statistics, but his office as presently constituted does not have the resources to provide these on a systematic basis.
4. In 1964 *Osgoode Hall Law Journal* began publishing an annual Supreme Court Review with a substantial statistical breakdown of the Court's docket for the previous year.
5. A "motion" refers to an instance in which the Court simply decided to grant or deny leave to appeal or to re-hear a case. Of the 1031 reported decisions, 30 were motions. Unreported motions have only been listed since 1957. Since then 300 unreported motions have been listed.
6. See John Cavarzan, "Civil Liberties and the Supreme Court: The Image and the Institution" (Master of Laws thesis, Osgoode Hall Law School, 1965), 14-16.
7. By constitutional law cases, we mean here cases in which the *sole* issue is whether or not a law is *ultra vires*.
8. Some cases were impossible to place under one of the four headings. These cases were placed under "other."
9. But the reduction of its case load in private law might enable it to grant leave more frequently to litigants who wish to appeal lower court decisions on important public law matters.
10. Of course, some criminal cases concern provincial penal sanctions.
11. See 40-2, for a summary of the rules governing the Supreme Court's jurisdiction.
12. I.e., if we were wrong in inferring that this difference is caused by the greater number of non-meritorious appeals which reach the Supreme Court through appeals as of right, the chance

of getting the result we report would be no greater than 5 per cent.

13. 28 U.S.C. No. 1254-7.

14. Karlen, *Appellate Courts*, 60.

15. The identification of these cases is based on Question 11 of our general questionnaire (see Appendix A). Undoubtedly the identification of these issues involves some rather subjective judgments. By bicultural issues, we had in mind any subject matter of a case which might be regarded as capable of producing a division of opinion along French vs. English, or possibly English-Protestant vs. French-Roman Catholic lines. The most prevalent type of bicultural issue was civil liberties. Seventy-five cases were deemed to involve questions of civil liberties. In addition to the few cases dealing with the statutory Canadian Bill of Rights, these 75 include disputes touching upon such classical libertarian social values as freedom of speech, religion and assembly, freedom from racial or religious discrimination and the citizen's right to due process of law in his dealings with public officials. A complete list of these cases is provided in Appendix B. The other bicultural issues were sub-classified into questions of family relationships, obscenity, morality, religious beliefs, educational matters and other issues which defy further classification. Lists of cases identified as involving each of these matters can also be found in Appendix B. It is important to note that the various sub-categories of bicultural issues are not mutually exclusive. Consequently many of the cases involving civil liberties issues may also involve one or more of the other bicultural issues.

16. See 54.

17. By constitutional law cases here we included not just cases which were solely concerned with constitutional challenges to legislation, as was the case in the scheme of classification used for Table IV.1, 116 (see also Chap. IV, n.8), but any case in which one of the issues raised was a question of the constitutional validity of legislation.

18. *C.P.R. v. A.-G. Sask.* [1951] S.C.R. 190; *Phillips and Taylor v. City of Sault Ste. Marie* [1954] S.C.R. 404; *City of Toronto v. Olympia Edward Recreation Club Ltd.* [1955] S.C.R. 454; *Texada Mines Ltd. v. A.-G. B.C.* [1960] S.C.R. 713; *Cairns Construction Ltd. v. Govt. of Sask.* [1960] S.C.R. 619.

19. *A.-G. N.S. v. A.-G. Can.* [1951] S.C.R. 31; *Western Minerals Ltd. et al. v. Gaumont et al.* [1953] 1 S.C.R. 345; *In Re The Moratorium Act (Sask.)* [1956] S.C.R. 31; *Ref. Re The Farm Products*

- Marketing Act* [1957] S.C.R. 198; *Dupont et al. v. Inglis et al.* [1958] S.C.R. 535; *A.-G. Ont. and Display Service Co. Ltd. v. Victoria Medical Bldg. Ltd.* [1960] S.C.R. 32; *Smith v. The Queen* [1960] S.C.R. 776; *Validity of Orderly Payment of Debts Act 1959 (Alta.)* [1960] S.C.R. 571; *Crawford et al. v. A.-G. B.C. et al.* [1960] S.C.R. 346; *Duplain v. Cameron et al. and A.-G. Sask.* [1961] S.C.R. 693; *A.-G. Ont. v. Barfried Enterprises Ltd.* [1963] S.C.R. 570.
20. *Wimmer v. S.M.T. Eastern Ltd. and A.-G. Can.* [1951] S.C.R. 887; *Johannesson et al. v. West St. Paul* [1952] 1 S.C.R. 292; *Validity of S.92(4) Vehicle Act (Sask.) 1957* [1958] S.C.R. 608; *O'Grady v. Sparling* [1960] S.C.R. 804; *Stephens v. The Queen* [1960] S.C.R. 823.
  21. As in the first *Saumur* case.
  22. The *Birks* and *Switzman* cases.
  23. Schubert, in turn, derived much of his methodology from the earlier bloc-analysis of Professor C. Herman Pritchett. Schubert has explained and illustrated techniques of bloc-analysis in a number of publications: "The Study of Judicial Decision-Making as an Aspect of Political Behavior," *American Political Science Review*, LII (1958), 1009-14; *Quantitative Analysis of Judicial Behavior* (Glencoe, Ill., 1959), chap.III; *Constitutional Politics* (New York, 1960), 155-71.
  24. Schubert, "Study of Judicial Decision-Making," 1012.
  25. See Table III.3, 67, for a breakdown of the number of judges sitting for different types of cases.
  26. Schubert, "Study of Judicial Decision-Making," 1013.
  27. In ordering the judges we have tried in all the tables to place each judge closest to the judges with whom he is in most agreement and farthest from those with whom he agrees the least. For this purpose we have followed the Matrix Construction method recommended by Schubert, in *Quantitative Analysis of Judicial Behavior*, 83-4. Often this principle of arrangement cannot be completely fulfilled, indicating, of course, an absence of underlying relationships among the judges.
  28. Schubert in measuring the cohesiveness of postulated dissenting blocs worked out an Index of Cohesion which is the ratio of the average number of times the members of a postulated bloc are paired together in dissent to the average number of times they have each dissented (i.e., the bracketed figure on the diagonal). Schubert considered an Index of Cohesion of .50 or greater to be



high. Applying this Index to Tables IV.6 and IV.7, we find in the first instance, for civil liberties cases, the Quebec judges as a bloc have an Index of Cohesion of .77; and if Cartwright is added, the Index is lowered to .67. When we add the three bicultural issue cases in Table IV.7, the Index for the Quebec bloc is .67 and for the three Quebec judges plus Justice Cartwright, it is .59. See Schubert, "Study of Judicial Decision-Making," 1012.

29. Schubert's test for the presence of a dominant majority bloc is an Index of Adhesion which is defined as the ratio of the average number of times the members of a postulated bloc are paired together in assent to the total number of split decisions under investigation. Schubert considered an Index of Adhesion of .60 or more to be high. In Table IV.8 the quartet of Justices Rand, Kerwin, Kellock and Estey, with an Index of Adhesion of .61, just meets this test. When the three other bicultural issue cases are added in Table IV.9, the Index of Adhesion for this possible bloc falls to .55. Still, for what would seem to be the core of this bloc—Justices Kerwin, Kellock and Estey—the Index of Adhesion is .64. Of course, when we bear in mind that on the Canadian Court judges are more often absent from the Court for particular decisions, Schubert's test should be modified, so that these figures might be regarded as rather high.
30. The indices of cohesion for the Quebec trio in the two groups of cases are .60 for civil liberties cases and .57 for those cases plus seven others involving other bicultural issues.
31. No grouping or pair of judges has an Index of Adhesion even as high as .50.
32. See Appendix A.
33. In section D, 156-73, of this chapter a more refined system for classifying cases into the various legal categories was used so that cases turning *solely* on the Civil Code were distinguished from those in which questions relating to the Civil Code were associated with the interpretation of Quebec or federal statutes. Thus the Civil Code cases used as a base for these tables will not necessarily coincide with those referred to as Civil Code cases in the post-1949 period in section D.
34. The bracketed figures on the diagonal record the number of times each judge assented.
35. This is true not only for split decisions but for all Civil Code decisions and, indeed, for all Quebec cases. See Table III.2, 65.
36. This difference in the frequency of dissents of the three groups is significant at the one per cent level.

37. Justice Hall served for such a small part of this whole epoch that his contribution to this pattern is negligible.
38. These cases were as follows: *Reference Re The Farm Products Marketing Act (Ont.)* [1957] S.C.R. 198; *Validity of Section 92(4) of the Vehicles Act, 1957 (Sask.)* [1958] S.C.R. 608; *O'Grady v. Sparling* [1960] S.C.R. 804; *Stephens v. The Queen* [1960] S.C.R. 823; *Smith v. The Queen* [1960] S.C.R. 776; *Oil Chemical and Atomic Workers' International Union v. Imperial Oil* [1963] S.C.R. 584.
39. These questions were applied by Mrs. Leonard Shifrin, a second-year law student at the University of Toronto Law School, and John Cavarzan.
40. Assuming, of course, that the Supreme Court's jurisdiction was not altered.
41. Supreme Court Act (1961), c.259, ss.28(2) and 29.
42. If this procedure were followed there might have to be more than one *ad hoc* appointment for a case. In one post-1949 Quebec appeal there were no Quebec judges present and in several others, only one Quebec judge present. Note also that our estimate that these situations would arise five or six times a year is based on the assumption that the same trend we have found in the Supreme Court's reported decisions would be duplicated in an equal number of its unreported decisions.
43. These differences are all significant at the 5 per cent level.
44. In *Taillon v. Donaldson* [1953] S.C.R. 257, which is perhaps the most celebrated of modern cases in which three non-Quebec judges prevailed against two Quebec judges on a question appertaining to an article of the Civil Code, the trial judge in Quebec had decided the case in the same way as the Supreme Court's "common-law" majority. See 185-8 for further discussion of this case.
45. Several of the lawyers who responded to our questionnaire on the use of language in the Court attached memoranda or wrote letters in which they expressed this opinion. Some provided quite detailed analyses of the professional background of the current Quebec judges on the Supreme Court which they compared unfavourably with the background of the majority of judges who belong to Quebec's appellate courts. See chap.III, section B, especially 110-111.

## Chapter V

1. While American literature on the rivalry between the positivist and realist theories of law is voluminous, the Canadian contribution to this subject is relatively slight. But for two distinctive contributions see W. Friedmann, "Judges, Politics and the Law," *C.B.R.*, XXIX (1951), 813; and Edward McWhinney, "Legal Theory and Philosophy of Law in Canada," in his *Canadian Jurisprudence* (Toronto, 1958), 17-18.
2. Quoted in Walter F. Murphy and C. Herman Pritchett (eds.), *Courts, Judges and Politics* (New York, 1961), 27.
3. For an articulate warning to neo-behaviouralists who, "having rediscovered the ancient truth that there is and must be pliability in the law," might "discount the equally ancient truth that there is and must be law in the law," see Wallace Mendelson, "The Neo-Behavioral Approach to the Judicial Process: A Critique," *American Political Science Review*, LVIII (1963), 603.
4. Quoted in Murphy and Pritchett, *Courts, Judges and Politics*, 27.
5. For further discussion of the Court's conservative adjudicative posture, see 55-8.
6. This is Professor McWhinney's phrase. See his *Canadian Jurisprudence*, 117.
7. There are, nevertheless, some notable exceptions to this as in Justice Taschereau's opinion in *Sauvage v. Quebec and A.-G. Que.* [1953] 2 S.C.R. 299, and Justice Rand's dictum on the rights of the Canadian citizen in *Winner v. S.M.T. (Eastern) Ltd. and A.-G. Can.* [1951] S.C.R. 887.
8. The preliminary work in this section was carried out by Donald Brown (LL.B. Osgoode Hall, LL.M. Harvard, now with the Faculty of Law, University of Singapore). While Mr. Brown's original selection of cases was carried out independently of the quantitative study reported in chap.IV, later drafts of this material took into account the cases used in the quantitative study, especially in relation to Question 11 on bicultural issues. (See Appendix A.)
9. See 54-5 and also 125.
10. Justices Kerwin, Taschereau and Estey concurred with Justice Fauteux. Justice Cartwright took the view that the Court had no jurisdiction in this case, and consequently expressed no opinion on the question.

11. *Piperno v. The Queen* [1953] 2 S.C.R. 295. (Original French: ". . . qu'un seul, que plusieurs ou que même les douze jurés soient versés dans la langue française ou dans la langue anglaise, ou dans les deux, dans tous les cas, le corps du jury est versé dans une langue familière à l'accusé.")
12. Justices Taschereau and Kellock both wrote opinions for the majority and both expressed agreement with the trial judge on this point. Chief Justice Kerwin concurred with Justice Taschereau; Justices Rand and Fauteux concurred with Justice Kellock.
13. *Reference Re Regina v. Coffin* [1956] S.C.R. 207. (Original French: "Malgré que dans un procès criminel, l'intérêt de l'accusé soit primordial, l'intérêt de la société ne doit pas être méconnu.")
14. Justices Cartwright and Locke offered no opinion on this point.
15. The authorities were Justice Brodeur in *Veuillette v. The King* [1919] 58 S.C.R. 424 and Justice Mignault in the same case at 430.
16. Our quantitative study turned up 12 cases in which English was used to explain a French text and seven cases in which French was used to explain an English text. See Appendix A, Questionnaire Applied to Supreme Court Cases since 1949, questions 14 and 15.
17. See, for example, Tables IV.6 and IV.7, 132 and IV.12 and IV.13, 137 and 138.
18. See 150.
19. In the area of family law the case of *Langlais v. Langley* [1952] S.C.R. 28, provides an example of a Quebec appeal which divided the Court on an important question of Quebec law—in this instance, the law of wills—but not apparently on lines of common law and civil law. G. V. V. N. Nicholls commenting on the case in *C.B.R.*, XXIX (1951), 979, wrote that, "However much the civil and common-law approaches to the judicial process may differ, the *Langlais* case certainly gives no support to the idea that the racial or legal background of a judge of the Supreme Court helps you to prophesy what answers he will give to a particular legal question."
20. As this decision came on an application for leave to appeal, the usual quorum of five judges was not required.
21. In *Hepton v. Maat*, Justice Locke dissented but not in principle: he was prepared to reverse the provincial Court of Appeal on the facts.



22. Justice Fauteux also cited some Supreme Court decisions but he relied on *Marshall v. Fournelle* for the basic rule to be applied in this case.
23. Original French: "Le père, et la mère à son défaut, ont d'après le droit naturel droit à la garde de leur enfant."
24. See, for instance, Léon Lalande, "Puissance paternelle—Déchéance—Droit civil et jurisprudence de Québec—Composition de la Cour Suprême du Canada" (Trans.: Paternal authority—Loss of—Civil law and Quebec jurisprudence—Composition of the Supreme Court of Canada), *C.B.R.*, XXXIII (1955), 950; and McWhinney, *Canadian Jurisprudence*, 9.
25. It is interesting to note that both Justices Estey and Fauteux quoted the same passage from Justice Rinfret's judgment in the *Stevenson* case—except that Fauteux added a dictum of an *English* authority to the effect that "The normal well ordered home is unquestionably preferable to the foster home, however well ordered."
26. A vivid example of this in French Canada was provided by the recent outburst of Chief Justice Dorion of Quebec against the secularization of textbooks in Quebec schools. *Toronto Globe and Mail*, Nov. 24, 1965.
27. The one opportunity before 1949 when the Court could deal with the capacity of the two levels of government to enact legislation restricting important civil liberties, and the effect of the federal division of powers on that capacity, was in the *Reference Re Alberta Statutes* [1938] S.C.R. 100.
28. Original French: "La Haine ardente du Québec pour Dieu, pour Christ et pour la liberté est un sujet de honte pour tout le Canada."
29. Chief Justice Rinfret disagreed nevertheless with some of the reasons of the two dissenting Quebec judges in supporting their conclusion.
30. F. R. Scott, *Civil Liberties and Canadian Federalism* (Toronto, 1959), 38. For further comment see also D. A. Schmeiser, *Civil Liberties in Canada* (London, 1964), 205-15.
31. J. T. Eyton, "Jehovah's Witnesses and the Law in Canada," *Faculty of Law Review*, XVII (1959), 96. Note that in an earlier Quebec decision, *Duval and Others v. Regem* (1938) 64 Que. K.B. 270, the Jehovah's Witnesses were convicted of seditious libel.

32. For the full implications of this aspect of the decision see Bora Laskin, "Our Civil Liberties - The Role of the Supreme Court," *Queen's Quarterly*, XLI (1955), 455; and "An Inquiry into the Diefenbaker Bill of Rights," *C.B.R.*, XXXVII (1959), 77.
33. See Horace E. Read, "The Judicial Process in Common Law Canada," *C.B.R.*, XXXVII (1959), 265; and above 55-8 and 177.
34. *Saumur v. Quebec and A.-G. Que.* [1953] 2 S.C.R. 318. (Original French: "Qui oserait prétendre que des pamphlets contenant les déclarations qui précèdent, distribués dans une cité comme celle de Québec, ne constitueraient pas une pratique incompatible avec la paix et la sûreté de la Cité ou de la province? Quel tribunal condamnerait un conseil municipal qui empêcherait la circulation de pareilles déclarations? . . . une municipalité dont 90 pour cent de la population est catholique, a non seulement le droit, mais le devoir, d'empêcher la dissémination de pareilles infamies.")
35. *Saumur v. Quebec and A.-G. Que.* [1953] 2 S.C.R. 304. (Original French: ". . . les pamphlets ou tracts qu'elle insiste à distribuer sans autorisation ont un caractère provocateur et injurieux, ne sont pas des gestes religieux mais des actes anti-sociaux. . . .")
36. Schmeiser, *Civil Liberties in Canada*, 86.
37. *Henry Birks & Sons (Montreal) Ltd. and Others v. City of Montreal and A.-G. Que.* [1955] S.C.R. 809. (Original French: ". . . ont l'effet de restreindre, dans son exercice, le pouvoir général subséquent attribué exclusivement au Parlement par le paragraphe 27 de l'article 91. . . .")
38. At the time of the raid the Quebec Court of Appeal had ruled that the pamphlet impugned in the *Boucher* case was a seditious libel. The Supreme Court had not yet reversed that decision.
39. Justices Fauteux and Abbott also wrote short concurring opinions of their own.
40. *Chaput v. Romain et al.* [1955] S.C.R. 852. (Original French: "Tous savaient qu'ils (i.e. Jehovah's Witnesses) étaient honnis du Québec et il n'y a rien de changé à leur égard.")
41. *Chaput v. Romain et al.* [1955] S.C.R. 840. (Original French: "Dans notre pays, il n'existe pas de religion d'État. Personne n'est tenu d'adhérer à une croyance quelconque. Toutes les religions sont sur un pied d'égalité, et tous les catholiques comme d'ailleurs tous les protestants, les juifs, ou les autres adhérents des diverses dénominations religieuses, ont la plus

entière liberté de penser comme ils le désirent. La conscience de chacun est une affaire personnelle, et l'affaire de nul autre. Il serait désolant de penser qu'une majorité puisse imposer ses vues religieuses à une minorité.")

42. Also in an earlier case, *Fineberg v. Taub* [1940] I D.L.R. 114, the Act had been upheld by Chief Justice Greenshields of the Quebec Superior Court.
43. *Switzman v. Elbling and A.-G. Que.* [1957] S.C.R. 294. (Original French: ". . . n'a nullement donné le caractère de criminalité à la doctrine communiste.")
44. *Switzman v. Elbling and A.-G. Que.* [1957] S.C.R. 299. (Original French: ". . . le pouvoir de décréter que ceux qui prêchent et écrivent des doctrines de nature à favoriser la trahison, la violation des secrets officiels, la sédition etc., soient privés de la jouissance des immeubles d'où se propagent ces théories destinées à saper à ses bases et renverser l'ordre établi.")
45. For an analysis of the case from this point of view, see comment by Claude-Armand Sheppard, *McGill Law Journal*, VI (1959-60), 75.
46. *Roncarelli v. Duplessis* [1959] S.C.R. 142. (Original French: ". . . comme officier public chargé de la prévention des troubles, et gardien de la paix dans la province.")
47. Justice Cartwright who also dissented did not consider the Article 88 issue, but held that the cancellation of the licence was not an actionable wrong.
48. On the crucial part of the judgment dealing with Benoit, Chief Justice Kerwin, Justices Cartwright and Judson concurred with Justice Rand. Justice Martland concurred with Justice Locke.
49. *Lamb v. Benoit* [1959] S.C.R. 339. (Original French: ". . . des précédents du common law . . . n'ont aucune application, et ne peuvent nous aider à la solution de ce litige.")
50. Edward McWhinney, *Comparative Federalism* (Toronto, 1962), 77. See also his "Federalism, Pluralism and State Responsibility—Canadian and American Analogies," *New York Law Review*, XXXIV (1959), 1079.
51. Dominion-Provincial Conference, 1960, *Report* (Ottawa, 1960), 28. (Original French: "L'expérience des dernières années a convaincu le gouvernement du Québec que les droits de l'homme n'étaient pas suffisamment protégés sur le plan de la juridiction provinciale. Nous croyons donc qu'il est maintenant nécessaire d'avoir un Bill des Droits de l'homme. Nous sommes aussi d'avis qu'un tel bill

aurait une bien plus grande valeur réelle et symbolique s'il faisait partie de notre constitution.")

52. For a persuasive analysis of this time-lag in relation to the U.S. Supreme Court, see Fred Rodell, *Nine Men* (New York, 1964).
53. See 71-7 for our analysis of the extent to which the existing system favours the appointment of politicians or provincial jurists who have ties with the provincial wing of the federal political party in power. This orientation in the appointing process has militated against the possibility of appointing Quebecers who might represent new or radical political and social developments in Quebec.
54. D. Kravnick, "The Roots of French-Canadian Discontent," *Canadian Journal of Economics and Political Science*, XXXI (1965), 522-3.
55. Robert Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker," *Journal of Public Law*, VI (1958), 294.
56. *Ibid.*, 293.
57. In two earlier cases the Supreme Court had dismissed attempts to apply the Bill of Rights to acts of Immigration officials, but advanced no extensive reasons. *Louis Yuet Sun v. The Queen* [1961] S.C.R. 70; and *Rebrin v. Bird* [1961] S.C.R. 376.
58. See Table III.3, 67.
59. Laskin, "Freedom of Religion and The Lord's Day Act - The Canadian Bill of Rights and the Sunday Bowling Case," *C.B.R.*, XLII (1964), 152.
60. *Toronto Globe and Mail*, Mar. 16, 1962, 8.
61. *Western Weekly Reports*, XLII (1963), 79.
62. Schmeiser, *Civil Liberties in Canada*, 246.
63. See 153.

## Chapter VI

1. See 76-7, 78, 81 and 86.
2. See 81-2, 85-9, 90-1 and 109-11.
3. See 95-7 and 109-11.



4. See 55-8.
5. See 52-5.
6. A recent statement of this viewpoint is provided by Dean Azard of the University of Ottawa's Law School, "La Cour Suprême du Canada et l'application du droit civil de la Province de Québec," *C.B.R.*, XLIII (1965), 553.
7. For an interesting illustration of the way in which civilian members of the Supreme Court may transmit English legal precepts into Quebec's Civil Code, see René H. Mankiewicz, "La Fiducie québécoise et le trust de Common Law" (Trans.: Trust in Quebec Law and Trust in Common Law), *Revue du Barreau*, XII (1952), 16.
8. We have discussed some of this scholarship in chap.I, 27-32. Note also should be made of the extensive study which Professor Paul A. Crépeau of McGill University has been carrying out on the impact of Privy Council and Supreme Court decisions on those parts of Quebec's civil law relating to civil responsibility.
9. See 44-9 for our discussion of federalist concerns.
10. This, for instance, would be the situation under the two-chamber proposal recently suggested by Dean Azard, "La Cour suprême du Canada," 496, fn. 1.
11. A prominent spokesman for this idea is Professor Jacques-Yves Morin of the University of Montreal's Faculty of Law. See his "A Constitutional Court for Canada," *C.B.R.*, XLIII (1965), 545.

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# Conference 2 Interpretation in Canada

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Thérèse Nilski

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Thérèse Nilski





The methods of overcoming the language barrier in a bilingual country have for some time been a matter of growing practical importance to ever wider circles of Canadians. This process has been accelerated and stimulated by the interest aroused in and through, the Royal Commission on Bilingualism and Biculturalism. While French Canadians have inevitably long been aware of the problems of overcoming a language barrier, the predominantly English-speaking people of Canada have only recently, in the electronic age which cuts distances and multiplies contacts, become conscious of the language difficulties on any large scale. All over Canada, people are making a more serious effort than ever before, to understand the real nature of the country. But while French Canadians have all along, by the nature of things, known about and largely taken for granted their part in the building of Canada (and are now intent on asking themselves the question: what use is Canada *to us*?) the rest of Canada's soul-searching is producing a new recognition of the value of diversity as contributed by the country's French Canadian component; and a growing number of voices are calling for more and better communication between our solitudes.

A number of suggestions have thus come before the Commission on how to foster direct communication, and how to deal with the educational problem of making more Canadians bilingual in the sense of McGill University's definition: "Bilingualism consists of the ability to express oneself in one of Canada's languages and at the same time be able to understand the other official language of Canada."<sup>1</sup>

A number of briefs have also suggested that, since direct communication is still so much a thing of the future, efforts should be made to extend the present use of translation (written) and interpretation (oral).<sup>2</sup> Thus, the Junior Bar Association, when presenting its brief in Montreal, proposed that simultaneous interpretation be made available in Canadian courts. The New Democratic Party of Ontario asked that the government provide a pool of interpreters for meetings of government agencies as well as for non-governmental organizations or associations. A number of briefs, including those by the Canadian

Book Publishers' Council and the University of Toronto Press, dealt with some of the problems of translation.

Both translation and interpretation are essentially tools of communication, and as such have a number of elements in common. It is a fairly widespread misconception, however, that the only difference lies in the sound-conveying equipment required for interpretation. In fact, the differences go deeper. As explained in subsequent chapters, not only the setup and the working conditions, but also the mental processes, and the aptitudes and skills involved in interpretation are different from those called for in translation.

This study will attempt to provide a bird's-eye view of the present and possible uses of interpretation in Canada, both in Quebec and in the rest of the country.

Conference interpretation will be taken to mean the oral reproduction, in another language, of the statements made during a meeting or discussion. While Canada has seen a rapid growth of this technique in recent years, and more is called for, few Canadians are aware of the practical implications, the advantages and limitations of the tool, or the problems involved: the circumstances in which it can be used effectively, its inevitably high cost, the present shortage of qualified interpreters in Canada (and indeed throughout the world, except possibly in Europe), as well as the difficulties of providing an adequate supply of qualified people, even for the future. Information on current trends in this field in Canada, as well as on the ways in which similar problems are being tackled elsewhere may be of practical interest to several groups of people. These include conference organizers on the lookout for efficient ways of providing their meetings with interpretation, would-be interpreters, and institutions or people who are planning to provide or are providing interpreter-training programmes.

Since interpretation is essentially a tool for oral communication between people in a group, it has had to adapt itself to the varying requirements of different types of meetings.

### *A. Simultaneous Interpretation*

The most adaptable and most commonly used form of interpretation is the relatively new *simultaneous* method which appeared and developed with the advent of electronic equipment in the 1940's and 1950's. It lends itself to large or small meetings, for formal speeches and informal discussion, as well as for a varying number and combination of languages. Naturally, the greater the number of languages and participants, the more complex the arrangements required. Full-scale simultaneous interpretation is a specialized and complicated service; Chapter IV will be devoted to a fuller look at its requirements.

While simultaneous interpretation with its microphones, booths, and earphones is the form most used at present and therefore the one best known, other methods not requiring this equipment are also possible.

### *B. Simplified Forms of Simultaneous Interpretation*

These may be used in special circumstances, notably for small two-language meetings where only a few of the participants have difficulty in following the main language. Reduced to its simplest form, the interpretation is whispered into a delegate's ear. Two delegates at the most can be assisted in this way, without unduly disturbing the rest of the meeting. This method is frequently used by visiting Soviet delegations, who bring their own interpreters. When the delegate in turn wants to speak, the interpreter translates his remarks "consecutively."

Where there are more than two listeners, simple equipment is sometimes used: there is no booth; the interpreter listens without



earphones and whispers into a shielded microphone (unkindly known in the profession as *le bidule* or "the spittoon"); the delegates hear the interpretation through earphones. Needless to say, this is a second-best solution, applicable in out-of-the-way places where high cost is a factor. (For example, the United States Department of State uses this method for groups of foreign dignitaries escorted on tours throughout the country.)

### *C. Consecutive Interpretation*

Consecutive interpretation is the second, but in fact much older, method of exercising the art. The interpreter takes notes while the speaker is giving his paper or making his speech, and afterwards gives the complete interpretation. A good interpreter can reproduce even hour-long speeches with show-stopping accuracy and brilliance. This skill surrounded a number of interpreters with well-deserved glory in the League of Nations days. Today, consecutive interpretation has lost some of its early glamour and dash, but it still retains much of its usefulness in the right circumstances. Since no electronic equipment is necessary, it is economical (and highly efficient) in small, two-language working or drafting meetings where accuracy is important. The interpretation can be readily checked, speakers have pauses for reflection, and actually time is often saved as repetitive discussion is discouraged and semantic misunderstandings are avoided. That is why the method is still favoured by experienced technical bodies such as committees of the International Telecommunications Union. Consecutive interpretation also lends itself especially well to press conferences, and provides the right flourish on diplomatic occasions, such as visits by foreign heads of state.

On the other hand, there are circumstances when it ranks as a poor second to simultaneous interpretation, in all but cost. When more than two languages are involved, consecutive interpretation becomes long and tedious. Also, when lengthy, highly technical papers are presented, the system is not at its best, for interpreters cannot be expected to have the same intimate grasp of scientific matters as the participants.

In Europe, consecutive interpretation is still fairly widely used (interpreters there practise it 15 to 20 per cent of their time). In North America, it is practically unknown, except at the UN Security Council where it is regularly used. Possibly this is so because we are richer in North America, and do not hesitate to use the costlier methods; possibly because consecutive interpretation involves sophistication and habit. While it is occasionally brought into play, here in Canada, it is practised more by accident than by design. Not infrequently, at board of directors' meetings, for instance, or at meetings of labour-union locals, where there are both English- and French-speaking members, the chairman or one of the officers repeats all statements in either of the two languages for the benefit of

those who do not understand them both. This is taken very much as a matter of course—and, like Mr. Jourdain who was startled to learn he was speaking prose, the members are unaware that they are listening to one of the most tradition-honoured and exacting forms of interpretation. The drawback, however, of combining the two functions is that it is apt to be even more disastrous for the chairmanship than for the interpretation.

A very recent use for consecutive interpretation has developed in Montreal's higher criminal courts where, from 1965 on, professional interpreters have been called upon when, as occasionally happens, English-speaking witnesses need to be heard while the defendant and the jury are French-speaking, or *vice versa*. Both judges and counsel are among the most fluently bilingual of Canadians; and yet it has been found efficient and time-saving to employ professionals adept at consecutive interpretation rather than, as in the past, persons who laboriously translate the evidence a few words at a time.

However vestigial the practical applications of consecutive interpretation may have tended to become, it is nevertheless a method that still has a very important role to play. It is quite invaluable in the training of competent interpreters, however "simultaneous" they may later be called upon to be. More will be found on this in Chapter VII, on "Training."



A list of the conferences and bodies that have been using interpretation in Canada would be a long one and would cover a wide range and variety of circumstances.

#### *A. Government Meetings*

In recent years, the federal government has increasingly made use of simultaneous interpretation. In 1959, the system was introduced in the House of Commons, and subsequently in the Senate and parliamentary committees. By 1969 this service was provided by a staff of some 20 full-time interpreters under the direction of Raymond Robichaud. The parliamentary interpreters are, administratively, part of the Translation Bureau of the Department of the Secretary of State, which coordinates translation work for all departments of the Government of Canada. In addition to their duties in Parliament, the interpreters are often assigned to other government-sponsored conferences, including federal-provincial meetings and a variety of inter-governmental conferences, both general and technical. They are also able to undertake a certain amount of work on a free-lance basis, mainly in Ottawa. Occasional interpretation requiring the use of a foreign language, in addition to English or French (notably Russian and German), has been met by calling upon the assistance of staff from the Translation Bureau's Foreign Languages Division. The Translation Bureau is currently providing some interpretation training for promising candidates.

Unlike most other institutions with a permanent staff of interpreters (the United Nations, its specialized agencies, the American State Department, and many others) which find it efficient and economical to call on the services of free-lance interpreters during periods of peak demand, the federal government's Translation Bureau has not been using this method. The only government-sponsored type of meeting for which free-lance interpretation has been in demand has



been the hearings of a number of Royal Commissions, especially since the early 1960's and especially when held in Quebec.

The Government of Quebec has so far been leaving it to the other parties involved in joint meetings or conferences to provide interpretation services, as and when they are needed. The introduction of simultaneous interpretation in the Quebec Legislature was reportedly under study in the late 1960's.

Meantime, the New Brunswick Legislature introduced simultaneous interpretation of its debates in 1968.

At the time of printing this report, in 1969, the Federal Parliament's adoption of the Official Languages Bill may entail a further expansion of translation and interpretation facilities needed in Canada.

### *B. Meetings of International Organizations*

Ever since Montreal became the headquarters of the International Civil Aviation Organization (ICAO) in 1945, Canada has been one of the few countries in the world that are hosts to a specialized agency of the United Nations. Until about the mid-1960's the United Nations family was the largest worldwide user of interpretation, both at headquarters in New York, at the sites of its various specialized agencies (UNESCO, ILO, WHO, FAO, ITU, and others), as well as at innumerable conferences and meetings organized throughout the world.<sup>1</sup> It contributed largely to developing and establishing present interpreting practices, and to setting standards of quality both for the organization of meetings and for the exercise of interpretation. It has trained a body of first-class professional interpreters many of whom are still on its permanent staffs in New York, Geneva, Montreal, and elsewhere. At peak periods, and for large conferences, the international organizations call upon the services of free-lance interpreters to supplement their permanent staffs. Conversely, the occasional availability of a core of permanent UN and ICAO staff members for outside conferences has been a source of strength to the North American free-lance circuit.

There are, in fact, no rigid divisions between the various types of meetings described in this chapter. Some organizations and conferences require the services of both free-lance and permanent interpreters. Certain congresses consist of plenaries with full-scale five-language interpretation, committees working in two or three languages, and occasionally, executive meetings that need only consecutive interpretation. Broadly speaking, however, the paragraphs above have referred to interpretation services provided by a permanent staff while the paragraphs below will describe the meetings generally served on a free-lance basis.

### C. *International Congresses*

Many international medical, scientific, technical, and professional associations hold worldwide congresses at two- to five-year intervals in different parts of the world in rotation. These are usually huge, formal, multilingual meetings at which carefully prepared scientific papers and the results of the latest research are presented by the foremost specialists in the field. They are usually organized in the big cities' largest hotels. New York, and to some extent Washington, are often chosen as the sites, but Montreal, possibly because of Canada's attitude towards the Eastern bloc, tends to attract such meetings. Their complex preparation and organization are generally in the hands of the national association; for example, the Canadian Paediatric Society acted as host to the World Paediatric Congress. The same association is unlikely to organize more than one such congress in a life span and therefore finds it important to rely on a sum of experience and advice available from other sources. The handbook on *The Planning of International Meetings*<sup>2</sup> deals with, among other things, how to provide for interpretation. It states at the outset: "No large international congress should be organized nowadays without simultaneous interpretation, but it must be borne in mind that the organization of an interpretation service is costly and difficult and is best left in the hands of a competent person. Second-class interpretation is worse than none from the point of view of communication. Financially, it is tantamount to throwing good money away."

Hence the importance of starting off by appointing an experienced and competent consultant, usually known as the "chief interpreter." His duties are to help select and recruit a qualified team of interpreters—often a formidable task, since first-class interpreters are few and far between, and interpreters specializing in scientific or technical subjects are scarcer still. At least two interpreters per language are required; but where the number of languages exceeds three, or the combination involves languages infrequently used at international meetings, the number of interpreters required rises steeply, as we shall see. Moreover, since interpretation may be needed at several concurrent sessions, several teams of interpreters may be required. It is not unusual, therefore, for a congress to have to recruit 15 to 25 interpreters. That number can seldom be found locally; hence there are constant exchanges between New York, Washington, Montreal, and even Mexico (the largest North American concentrations of interpreters). Occasionally European interpreters have to be brought over for congresses in North America, while North American interpreters are sometimes called upon to work as far afield as Tokyo, Delhi or Australia. In fact, there are peak periods of the year into which a great many international congresses need to be fitted; and as the number of good interpreters is limited, a congress is unlikely to be able to get first-rate service unless it has made its arrangements well ahead of time, generally over a year in advance.

Besides recruitment (which includes the preparation of contracts, and advice on financial and travel arrangements), the chief interpreter is responsible for advising the congress on conference planning to permit the most effective and economical use of interpreting services. His experience with equipment companies and installations may be valuable to the organizers (*see* Chapter IV).

The chief interpreter will also, together with the congress, set up the briefing sessions needed before highly specialized conferences. The interpreters are given one or more days on full pay to study the terminology and subject-matter of the meeting and are given a chance to consult specialists whose mother tongues are the official languages of the meetings (*see* Chapter IV).

The chief interpreter also helps the congress to organize a documentation committee, whose task is to obtain beforehand all copies of papers to be read out at the meeting, for advance preparation by the interpreters. This is a thorny task, for speakers generally have to be asked repeatedly before they finally agree to deliver their brain-children to interpreters, but, for the reasons explained in Chapter IV and Appendix F, it is essential to the success of the meeting that they do so.

Finally, during the course of the congress itself, the chief interpreter is responsible for looking after the interpretation arrangements, assisting his colleagues, and ensuring coordination with the congress authorities.

Arrangements for meetings other than full-scale international congresses are proportionately less elaborate. The principles remain the same, but the services become simpler as the function decreases in complexity.

#### *D. Working Group Meetings*

Seminars, round-table discussions, study groups, and technical conferences are based not so much on the presentation to large audiences of written papers, as on free-ranging discussion among a number of participants. Again, it is important to select a team of interpreters suitable for the meeting's work load, subject, and language combinations. As always, this is best done through advance consultation with a competent and experienced interpreter. Proper physical facilities are as essential here as elsewhere (*see* Chapter IV).

#### *E. Intra-Canadian Users*

In Canada, there is a wide range of meetings which do not quite fall into either the congress or the working-group category. They include political rallies, with platform speeches by politicians; panel discussions before a large or small audience; lectures accompanied by slides or films and sometimes followed by public discussion;



sales-promotion conventions with their three-ring-circus hoopla; meetings of labour unions, local, provincial, or national; and the different meetings called by a wide variety of national associations—medical and scientific societies, as well as legal, political, social, and trade groups. Finally, interpretation is sometimes required at labour-management negotiations, company press conferences, or meetings of various boards. In each case, it is important to have a realistic assessment made of the actual circumstances and needs. Which speakers, in what languages, will have to be interpreted for what audience? How many members of the audience will not understand one or more of the languages spoken at the meeting, and which ones? Only too often the organizers just think about getting a couple of interpreters and a lot of headsets and they end up with an inefficient service, with improperly selected and inadequately briefed interpreters, which is either wastefully costly or self-defeatingly cheap.

Finally, interpretation is occasionally used for purposes other than meetings: for radio or television programmes, in courts of law or arbitration proceedings, or in escorting foreign delegations. Since the possible arrangements are multiple and flexible (especially in television, where tie-in is important, and technique has great visual and emotional impact so that new approaches are constantly being worked out), it is advisable that the persons responsible be familiar with the relative merits and disadvantages of the various practicable forms of interpretation and installation.

This chapter has dealt with the various ways in which interpretation may be used as a tool of communication. There is, however, an incidental marginal benefit which might be mentioned: namely, the possible didactic value of the service. In the United Nations, many an English- or French-speaking delegate has picked up a smattering of Spanish or Russian simply by listening to the interpreters while the familiar speeches drone on. At Canadian meetings, it is surprising how often people will come up and say, "You know, I don't really need this earplug, I understand quite a bit of French, but it's a wonderful way of checking up on what I think I know," or they will hold out the little transistor set and remark "This is one way of practising my French!"

In this sense, interpretation not only helps to communicate; it teaches how to communicate. The University of Toronto Press (in a different context it is true) expressed in its brief to the Commission "optimism . . . concerning the prospect of improving the ability to communicate between Canadians whose mother tongue is French or English, through increasing frequency of contacts." Conference interpretation has a role to play here, although it would probably be excessively sanguine, at this point, to see it as self-liquidating even in the Canadian context!

It might, however, be interesting to investigate to what extent the bulk of Ottawa MP's, who have now had simultaneous interpretation for several years, have in fact been helped to feel more at home with French. In 1957, at a NATO meeting, Lester Pearson who was then



leader of the Opposition, mentioned in a private conversation that he was opposed to the then-contemplated introduction of simultaneous interpretation in the House. It would just encourage English-speaking MP's to drop their erstwhile efforts to learn French, he said. To what extent has time borne out his initial assumption or invalidated it?

### *A. Criteria of Quality*

Renowned interpreters, the high priests of the profession, are not averse to surrounding themselves with some of the awe that cloaks man's more occult pursuits. But interpretation is, of course, neither magic nor mystery. It is a tool, a tool that must restore instant communication whenever language places a barrier to direct understanding. Like any expensive and delicate instrument, it must be handled proficiently. To be at all good, it has to be very good; producing anything short of understanding can only amount to misunderstanding.

There is no half measure; and so, any compromise with quality merely defeats interpretation's purpose. Instead of a precise tool, the conference ends up with a plaything, a toy. Even in this field, a toy is occasionally called for; once in a while, a meeting wants only the current status symbol of "bilingualism." But, unless chosen deliberately for that purpose, a toy is a poor bargain and will not perform the work of the tool.

This particular tool has three elements, any one of which can, if defective, jeopardize the whole tool's usefulness. Although each element may and should be rated individually, the usefulness of interpretation for any given meeting must be judged as a whole. To be satisfactory, it must meet the overall tests of clarity, faithfulness, and smooth integration into the course of the meeting.

The listeners must be able to hear and to understand. Not only must the listening-sets be good and the volume and tone adjusted properly, but also the interpreters must communicate clearly and enunciate distinctly.

Faithfulness involves more than an accurate rendering of words. The interpreter must know not only the languages and the subject matter but also enough of the speaker's background to convey accurately his train of thought, and his mood and personality. Adequate qualifications and preparation as well as proper hearing facilities for the interpreter are thus involved.

Finally, good interpretation must not interfere with the proceedings. Because it is an inherently complex, and sometimes cumbersome service, it can have a disrupting effect on the meeting or prove distracting to the participants, if it is improperly planned or unskillfully handled. Of course it must not have this effect. With the proper experience and foresight, disruption can be avoided. Thus, there should be no technical or other hitches that interrupt the flow of the meeting. Good equipment and skilful technicians are essential. Soundproof booths are required, so that interpreters' voices do not flow into the conference room. Interpreters must not let their tone or pitch, pronunciation, hesitations, mannerisms—or nerves—distract listeners' attention from the subject. If, after a short period of getting used to the system, the participants are being helped to communicate spontaneously, naturally, almost without being aware of the intervening language barrier, then the service of interpretation is doing its job properly.

## *B. The Necessary Components*

### *1. Qualified interpreters*

Judging the quality of an interpreter's work is not easy for someone who is not already thoroughly familiar with the system. A casual listener or reader can more readily say whether, for instance, a journalist or broadcaster is doing his job well or poorly. But interpretation is a relatively new technique and involves the unfamiliar exercise of listening to a different language with each ear. If the listener does not know the language of the speaker, he cannot really say whether the interpretation is bad or whether the original speech is unclear. Even if he does happen to know both languages, his initial reaction is one of incredulity or amazement, for even a poor interpreter is more skilled at transposing one language into another than is the listener. It takes some time and encouragement, therefore, for the public to develop a critical ear. Thus the best guarantee of good performance is still acceptance by other interpreters in the light of the standards of professional practice developed by the interpreters themselves over the years.

An eminent interpreter at the Quai d'Orsay, Constantin Andronikof, puts the problem this way:

[Il nous faut] prendre conscience de ce que nous sommes des linguistes, et non des polyglottes habiles à traduire des mots. Un linguiste, dans ce sens, c'est quelqu'un qui connaît non seulement les termes et leurs équivalents dans d'autres langues, mais encore les structures et les fonctions du langage, qui sait ce que parler veut dire, et pourquoi.

L'interprète doit savoir suivre non seulement toute démarche du langage, mais encore tout cheminement de la pensée. Nous ne transposons pas des vocables, nous donnons une forme aux idées exprimées par autrui dans le génie d'une autre langue. Et si, dans telle

circonstance, nous nous y sentons incapables ou insuffisants, il faut nous l'interdire, comme nous l'interdirions à un débutant.<sup>1</sup>

a) *Language proficiency: A, B and C ratings*

Thus, as l'Association internationale des interprètes de conférence (AIIC) states in its study on the language classification of interpreters: "On n'est pas interprète en général, on est interprète pour certaines langues, dans certains sens linguistiques."<sup>2</sup> It is one of the cornerstones of professional practice, now universally accepted, that individual interpreters work into and from particular languages according to a system of ratings established by AIIC and already closely followed throughout the world. This classification defines the categories of professional practice undertaken by particular interpreters. The AIIC Yearbook, a membership list, rates as A, B, or C its members' qualifications in the active or passive languages they use at work. An "active" language is one into which a member interprets, and a "passive" language one into which a member does not interpret but of which he has a complete understanding and from which he interprets into his active language. The classification is:

- A—the principal active language (or languages, when they are on exactly the same level);
- B—other active languages;
- C—passive languages.

And AIIC explains:

. . . le travail d'un interprète en langue "A" est le plus aisé, le plus élégant et, pour l'utilisateur, le plus convaincant ainsi que le plus agréable à écouter. . . . C'est presque toujours la langue que l'on appelle communément "maternelle." Cependant, cette notion de langue "maternelle" est difficile à utiliser dans une profession telle que celle des interprètes, qui ont souvent acquis plusieurs langues au cours de leur enfance, de leur adolescence et de leurs études.

L'A.I.I.C. a donc opéré jusqu'ici au moyen de la notion "*sans se distinguer d'un autochtone*." Précisons tout de suite que "*sans se distinguer d'un autochtone*" ne se réfère pas uniquement à l'accent; il faut de plus que la construction soit idiomatique, que le débit soit aisé, il faut que la richesse des moyens d'expression corresponde à ce que l'on est en droit d'attendre d'un "autochtone" *cultivé*, qui a toujours parlé cette langue et qui a fait ses classes en cette langue.<sup>3</sup>

At the other end of the scale, "C", or the passive language, fully understood but not necessarily spoken, also presents a clear-cut case. But it is the category "B" in between that is a more troublesome one to define, for it covers a whole range of possibilities. These are the languages that do not quite measure up to "A" standards, that is, they are distinguishable from the speech of an educated native-born person, but still the interpreter can use them fluently. A reputable interpreter will not agree to interpret into



his "B" language at an exacting meeting, although he may very well work into it in consecutive interpretation or, occasionally at easier meetings, in simultaneous interpretation.

Because of the essential stringency of the necessary language qualifications, few interpreters use more than three or four languages at work, and few have more than one A (about 20 per cent have two A's while only 3 out of AIIC's 444 members in 1962 had three A's).

*b) Recruitment related to language "ways"*<sup>4</sup>

A corollary is that at multilingual conferences, the number of interpreters required rises steeply. Where three languages are used, there are six language combinations or "ways." With four languages, there are twelve language ways, four times three. With five languages there are no fewer than twenty language combinations and that makes the translation operation highly complex. Because it is difficult and indeed sometimes impossible to find a team of interpreters who can cover all those twenty ways directly, the unusual language combinations are covered by the relay system (for instance a French interpreter who does not understand German, interprets a German speech not from the original, but in relay from what he hears his English or Spanish colleague saying). This is a disagreeable and often perilous procedure, to be used only as a last resort. Ideally, therefore, at multilingual meetings the team should consist of  $N$  multiplied by  $N - 1$  interpreters, where  $N$  represents the number of languages used at the conference. In Europe, AIIC follows a complicated system of *grandes et petites équipes* to meet the problem of language ways. In the Americas, the current practice is to recruit a minimum of two to three interpreters per language in such cases.

However, it is not always essential to equate the number of languages spoken at a conference with the number of languages into which interpretation is provided. A new trend is developing, based on a recognition of the need to allow people to speak their own language as often as possible, coupled with the increasing comprehension of several basic languages among the world's experts. Thus, a conference may determine which are the generally understood languages in its field; usually these will be chosen from among English, French, Spanish, German, or Russian. All that is said at the conference is interpreted into these chosen languages. However, speakers may also be allowed to use a certain number of additional languages, possibly including Dutch, Italian, Japanese, or Portuguese. Interpretation is then also provided from these languages into the selected basic languages. When it is established that these are understood by all the conference participants, as they often are, this solution offers certain advantages of economy and flexibility.

*c) Work loads*

In Canada, three- to five-language conferences are not very frequent. At a guess, 80 to 90 per cent of interpreters' working time here is spent at bilingual meetings (which only involve two language ways). After much trial and error, it has become established as a sound working rule that a normal day's work load at a bilingual

meeting requires a team of three interpreters if they are working in a single booth. Where the proportion of English and French is more or less evenly balanced, one of the interpreters should have an A rating in French, the other an A in English and, ideally, the third one an A in both English and French. This allows interpreters to relieve each other every 15 to 30 minutes.

A linguistically balanced meeting is, however, as unusual as an average man. It is therefore important to establish the actual proportion of English and French to be spoken, so as to form just the right team of interpreters. Recruiting the best possible team for each meeting is one of the more specialized aspects of the whole business, and one whose handling very definitely calls for sound advice by an experienced person.

#### *d) Interpreting written texts*

A question interpreters are frequently asked is: "But how can you keep up if the speaker is very fast?" Curiously enough this is seldom a major problem in itself. It *is* a problem to follow a muddled speaker, or one who cannot be heard clearly, or one who is talking on a subject the interpreter knows nothing about. Still, a brilliant fast speaker is often easier than a very slow and ponderous one. As long as the speaker is intelligible to his audience directly, the experienced and briefed interpreters can generally keep up.

But if any difficulty exists, it is compounded whenever a speaker reads a prepared text. Interpretation is geared to the kind of communication that occurs during speech; the translation of written texts should, ideally, be written. The thought process is different in the two instances and so is the vehicle of communication. In writing, the subject is carefully thought out and precisely drafted; there are fewer words, they are used more meaningfully, the sentence structure and style are apt to be more involved and also more literary. The writer has taken pains over his draft, moving a sentence here and changing a word there. Instead of putting his thought into words as he goes along and addressing his listeners directly (however brilliant and fluent and articulate a speaker may be, an interpreter's brain waves have a chance of flowing along the circuit at the same rate) the speaker who *reads* his message conveys it in a more remote, condensed, and linear form; and it is far more touch-and-go whether the interpreter will manage to take in and convey all he is hearing for the first time, without leaving gaps or making mistakes. That will depend on a number of factors: mainly the subject matter, its complexity, and the rate and clearness of delivery. It is one of the unfortunate facts of life that written texts are almost invariably read out faster and more colourlessly than if they were spoken. Hence they are that much harder to follow and understand.

To guard against this, it is sound practice for scientific and technical congresses to place a word limit rather than a time limit upon papers to be presented by the participants. Otherwise a speaker may be tempted to cram twice as many words as reasonable into the ten or twenty minutes allotted to him—with unfortunate results for his

audience, especially for those of his listeners who are not altogether familiar with his language.

For all the above reasons it is unfair to expect an interpreter to do a first-rate job of interpreting a complex written text he has never seen before. If the speaker has gone to the trouble of writing out his text, and wants full justice done to it, he should get it translated in advance, also in writing. Otherwise, he should see to it that his interpreters get a chance to study the text *before* the meeting at which it is to be delivered, in order to become acquainted with the train of thought and particularly to look up any scientific, technical, or unusual details or terminology. Being handed a written text just as the speech is about to begin is worse than useless: trying to listen, to read, to understand, and to speak intelligibly all at the same time is unlikely to be a successful exercise. In fact, few good interpreters like to follow a written text while they are interpreting; even if they have studied the text in advance, their work is likely to be better if they concentrate on listening once the actual moment comes.

AIIC writes on this subject: "L'expérience prouve que l'on ne rappelle jamais assez que l'interprétation simultanée ne doit pas être confondue avec une sorte de traduction à vue: un traducteur lit puis écrit: son rythme de travail, fonction de la difficulté du texte, varie entre 100 et 500 mots à l'heure; l'interprète doit écouter et parler *simultanément*: il doit travailler à la vitesse à laquelle parle l'orateur: 6,000 à 8,000 mots par heure."<sup>5</sup>

Incidentally, it is in this context interesting to note the comparative work loads handled by the two sister professions, interpreting and translating:

D. Seleskovitch a calculé que dans l'hypothèse d'une séance de sept heures (dont six en moyenne seraient consacrées à la parole) en "grande équipe" [3 interprètes pour 2 langues] chaque interprète effectue 33% du travail, donc 2 heures. À environ 120 mots par minute, il fait 14,500 mots. Si le traducteur, à journée égale, compose entre 6 et 7 pages, il fait de 1,500 à 1,750 mots. Donc, en mots, l'interprète travaille 7 à 8 fois plus que le traducteur. Cela n'enlève rien à celui-ci, mais précise l'intensité du labeur de celui-là, sans compter les autres facteurs.<sup>6</sup>

This calculation also throws light on why it is impossible to expect off the cuff interpretation of a written text to equal a good translation in accuracy and style. On the other hand, in practice, interpreters are sometimes handed a prepared translation of a speech, which unfortunately turns out to be a poor translation, unidiomatic or inaccurate; but a good interpreter should normally have no difficulty in correcting such shortcomings for the live audience as he goes along.

Ironically enough, it sometimes happens that, impressed by all the above dire warnings, a scientific congress will ask its speakers on no account to stray from the written texts they have submitted for study to the interpreters. Consequently before long a distinguished



university professor, much used to lecturing, gets up and querulously announces he is being forced to read a paper rather than speak on his subject. An unhappy confusion. The interpreters much prefer coping with extemporaneous speech rather than labouring over a written text. If the subject is abstruse, they will greatly appreciate being given a chance to study the lecturer's notes in advance, or some bibliographical references. But it is only if a speaker insists on reading his text that he must, in his own interest, make sure it is supplied to the interpreters well in advance. (A specimen letter to conference participants, covering the above points, is reproduced in Appendix F.)

*e) Preparatory documentation and briefing*

It is assumed, in what follows, that the interpreters have the necessary aptitudes, educational background, training, and other prerequisites mentioned in Chapter VII. But however well educated, qualified, and experienced they may be, they will need to do a certain amount of study and preparation for the great variety and range of conferences they will be dealing with. For instance, during the drafting of this study, the author has worked in areas as diverse as general economics, politics, and current affairs, interspersed with the following specialized subjects: stomatology, air-traffic control and telecommunications, anaesthesiology, right-of-way legislation, medical research in a variety of fields, criminology, the lumber and pulp industry, psychiatry, computers and information processing, book publishing, and architecture (at both Canadian and worldwide meetings). Different degrees of preparation are of course required for different conferences. For some, the interpreter has to study textbooks and manuals in advance, preferably in the two or three languages involved; in such cases a two-day period of briefing is also required to prepare papers and consult specialists suggested by the meeting. But even at best, when the subject and terminology are already familiar, the interpreter will need to refresh his memory, to review the subject and the vocabulary, possibly to find out about the background of the organization, to become familiar with the names of the participants, and also preferably to read related material in his own active language to get into the spirit of the thing.

From past experience, the following documentation should be provided in advance: in all cases, a detailed programme of the meeting indicating speakers and subjects; and, as required, a list of the participants, the constitution and by-laws of the organization as well as any financial or statistical reports, and background material for technical and scientific subjects; also, invariably of course, any written texts to be read out. Experience shows that both organizers and participants are never sufficiently informed, reminded, and hounded about these requirements.

So far, interpreters have tended to specialize essentially by language. Thus, they have promoted uniformity in, and recognition of, a standard language classification system, as explained earlier. On the other hand, it has been taken for granted that a top-flight interpreter has, or should have, the ability to cope with the most



diverse range of subjects that come his way. However, the best interpreters are themselves gradually coming to realize the limitations of such versatility. They are beginning to look towards the day when subject-specialization will become part of their accreditation system. At present, it is only after some years of more or less painful trial and error that we individually discover which are the subjects and types of conferences we ourselves lean towards, or away from; and which of our colleagues are especially good—or especially hopeless—in given fields as diverse as, for example, business and finance, the physical sciences, technology, law and politics, the medical and biological sciences, or the arts.

Members of AIIC and TAALS (The American Association of Language Specialists), it is true, bind themselves under the *Code of Professional Conduct* to "refrain from accepting conference engagements they do not feel qualified to undertake."<sup>7</sup> But of course self-criticism takes some years to develop; and it is optimistic to hope that the eager beginner or the veteran plodder will have sufficient self-knowledge, self-assurance, or financial independence to search his soul about an attractive offer when it comes his way. In the past, interpreters have been few enough for news of fame and blame to travel rapidly, and thus they have tended to be reasonably familiar with their colleagues' subject qualifications. With the expansion of the profession in recent years, and the growing complexity of specialized conferences, both interpreters and (especially) conference organizers need a more objective system reflecting not only language proficiency but also subject specialization.

Meantime, it is up to conference organizers to keep their ears open for any outstanding interpreters they may have the luck to come across in their particular line of duty, and to cultivate them for the rare birds they are—remembering however that no matter how well versed the interpreters are, it still pays to brief and document them properly before each meeting.

*f) Film showings*

Films shown during a meeting present a special problem, if they are to be interpreted. The difficulties arise out of the split-second timing involved, the presence of background music which tends to make the words less intelligible, and frequently the poor quality of sound. For these reasons, if interpretation is really required, special precautions need to be taken:

- 1) The sound engineers must see to it beforehand that the sound-track output is directly connected to the interpreter's ear-phones. Distortion and projector noise are magnified if a room microphone is merely put near the projector's loudspeaker.
- 2) The interpreter should preview the film before the actual screening, and he should be supplied with the written script if at all possible. In fact, interpreting a film is apt to be almost as laborious as dubbing if it is to be at all satisfactory.

*g) Taping of proceedings*

It will be clear from all the above that, while interpretation may

be perfectly intelligible when listened to—since tone and inflexion may make up for many liberties with syntax—it is likely to be disappointing when transcribed to serve as a record or translation of the proceedings. Using interpretation in this way is, therefore, apt to be of dubious value; but, if really necessary, special arrangements may be made at the discretion of the interpreter. A transcript of the interpretation will usually need editing, and the interpreter may be ready to undertake this service himself. Such editorial work is currently being carried out by the Ottawa parliamentary interpreters for the debates published in Hansard; and its incidental benefit is that it helps interpreters keep a running check on the quality of their work. However, since interpretation is essentially furnished for the convenience of participants at the meeting, should tape recordings be taken for other purposes, including broadcasting or press releases, they are considered to be an additional service, subject to a separate fee.

#### *h) Identity of interpreters*

In the international civil service, as in most national civil services, individual officials maintain a well-established tradition of anonymity; public credit or blame goes not to them, but to the responsible head of department, ministry, or government concerned. Interpreters on the permanent staffs of the United Nations and its various agencies have been shaped by this tradition; and, in their wake, anonymity has spread into the free-lance field. So, listening delegates see rows of nameless faces, lips mouthing silent words inside eerie glass-fronted aquaria—and can seldom identify a voice with a person otherwise than as male or female. And yet, since in the free-lance field the interpreter is his own master, hired under an isolated contract for short-term work and personally responsible for its quality, it is sheer anachronism to maintain the disembodied trappings of anonymity. As stated in the *Practical Guide*: "Whoever may be responsible for recruitment and team coordination, the individual interpreter retains full responsibility to the employer for his work (*see* Art. 3 of Professional Code of Ethics). It is in the interest of the employer and of all genuine conference interpreters that this responsibility should be clearly established and that everything be done to ensure that each interpreter can be identified in the course of his work. . . ."<sup>8</sup>

AIIC has passed resolutions urging its members to make sure, during each assignment, that their individual names are known not only to the conference organizers but can also be readily checked by the conference participants. In some cases, this is done by having the interpreters' names printed in the conference programme. However, since this is just one of the many details crammed into such a programme, here in Canada the practice of placing each interpreter's name on the booth in front of him has been gaining a foothold and seems to have much to recommend it. It is a powerful incentive to interpreters to do a good job, with the built-in reward of recognition; it is a protection to them against unqualified competition; and is one of the best ways a conference can safeguard itself against

incompetence in a field of work whose fleeting nature makes merit hard to assess.

## *2. Technical equipment*

The second essential ingredient in satisfactory interpretation is good technical equipment, looked after by experts, working without a hitch, adjusted to the special requirements of each meeting.

### *a) Permanent installations*

Permanent installations are invariably superior to portable systems. They alone can provide perfectly soundproof yet well-ventilated booths, a high quality of reception for both interpreters and delegates, and adequate standards of comfort and convenience for everyone involved. Unfortunately, there are as yet in Canada all too few conference rooms with adequate provision for such installations. The United Nations in New York and the State Department in Washington have conference rooms that are probably among the best equipped in the world, besides being spacious, soundproof, and air-conditioned. In Montreal, ICAO has several well-equipped rooms, and the University of Montreal has a small conference room it uses mainly for training purposes.

Montreal is fast becoming North America's second largest convention centre. Regrettably, none of the city's convention halls has permanent interpretation facilities. This compares unfavourably with the many less affluent countries of Europe and Latin America which offer splendid modern congress centres, equipped with an impressive range of highly sophisticated interpretation, projection, and visual-aids equipment. North American cities, geared mainly to large business conventions, unfortunately seem to pay less attention to the needs of scientific congresses. A timid attempt at installing permanent equipment was made when the Queen Elizabeth Hotel was being built. Unfortunately, no one with experience of interpretation was consulted early enough in the planning stage, before and during construction; by the time qualified advice was sought, it proved to be too late and too expensive to remodel the utterly unsuitable space provided. As a result, the many meetings that have used interpretation there every month for years have had to make do with portable equipment. Montreal's two newer and even more lavish convention centres, Place Bonaventure and the Château Champlain, similarly are content to offer the rudimentary facilities of rented portable equipment. Expo 67 took a few small steps in the right direction. The Administration Building's small auditorium had well-designed and integrated built-in facilities, including satisfactory booths; so did the French Pavilion with its two elegant little theatre-conference rooms. The Dupont Auditorium had a good electronic installation, but a pitifully ill-planned layout for the interpreters about whom the architects had failed to think when drawing the floor plan. All in all, this is not an impressive record for a city that prides itself on being a great bilingual and international crossroads.



*b) Portable systems*

In the absence of permanent equipment, portable systems have to be resorted to. They are leased out by a variety of private commercial enterprises and vary greatly in quality. These days, they are usually of the transistorized radio variety, so that delegates' earphones need not be wired. They are handier than the portable wired systems used even eight or ten years ago. Only two or three big companies in North America provide multichannel equipment for three or more languages; several smaller companies rent out single-channel equipment for two-language meetings. In every case, before signing a contract, conference organizers should make quite sure they are renting good equipment, looked after by competent technicians. Experienced interpreters can provide them with useful advice on this. In North America such advice is almost invariably impartial. While there is in principle no ethical objection to interpreters having a financial interest in an equipment company, in fact there has been a strong trend here (encouraged by the professional associations) for reputable interpreters to shy away from any such connections, in order to preserve complete independence towards companies as well as towards organizers and colleagues.

*c) Requirements for an efficient service*

AIIC is working out a full set of technical specifications for satisfactory interpretation equipment. Pending its publication, here are some basic pointers.

- 1) Audibility is essential. The sound reaching the interpreters through the earphones must be sufficiently loud, clear, and free from any kind of interference and distortion. Though it might not unduly worry casual listeners and delegates, poor sound impairs the hearing and concentration of interpreters and therefore is a considerable hindrance, if not an obstacle, to good interpretation.
- 2) The sound output (from booth to delegates) must also be carefully adjusted and controlled. Long stretches of listening through a "hearing aid" are a strain on delegates and every effort should be made to help them hear clearly. Public address systems are often incompatible with interpretation: their volume is set so loud that it drowns out whatever the interpreter is saying, and occasionally even causes feedback into the speaker's own microphone. A cause of frequent difficulty lies in the fact that the loudspeakers are generally controlled, not by the equipment company, but by hotel electricians, who know little about the needs of interpretation. A competent equipment company will know, however, how an obtrusive public address system may be toned down to the proper "sound-enhancement" level.
- 3) The sound engineers must make sure in advance of the meeting that the size and shape of the room are suitable for the required installation. This cannot be taken for granted. Sufficient microphones have to be arranged for, whenever there is to be general discussion or discussion from the floor. Compatibility of microphones and other components with equipment on the premises must



be checked. If the speakers are to show slides, demonstrations, or to use the blackboard, they will have to be provided with roving neck microphones—in advance rather than in the middle of the proceedings. Screens or blackboards should also be placed within sight of the interpreters in the booths.

- 4) Each of the rooms where interpretation is provided must have a good sound engineer on duty and on watch throughout the meeting. It is his responsibility to have the equipment checked and in proper working order from the very start of the meeting. He should also have adequate spare parts readily available in case of failure, should periodically check audibility levels, and should switch speakers' microphones on and off as needed (the interpreters are only responsible for the switching on and off of their own microphones). There must never be more than one microphone on at the same time in the conference room; otherwise there is both a reduction in sound intensity and a disturbing increase in background interference.
- 5) Interpretation booths must have: a clear view of speakers, slides, blackboards, and so on; sufficient space to seat at least two people in reasonable comfort, remembering the booths are intended for long periods of use by people whose work is strenuous and tense; adequate ventilation (a fan is seldom noiseless, and only moves the air around without actually ventilating); adequate soundproofing (unfortunately difficult to achieve in portable booths; it is extremely tiring for the interpreter to have to speak in an unnaturally low voice for long periods, and it is also very monotonous for the listener); easy access to the booths, so as to enable interpreters to replace each other without difficulty; access should preferably be independent so that interpreters do not have to go through the conference room; within the booth, individual volume controls for each interpreter's earphones, individual microphones with on-off switches, adequate light, controlled independently of room lights, sufficient table- and shelf-space for papers and notes, also water, glasses, paper, and pencils.

A reputable equipment company will be thoroughly familiar with these arrangements; but they should preferably be double-checked by the conference organizers and the chief interpreter. Coordination is thus advisable between them before the meeting. Further useful details on equipment and booths may be found in the *Practical Guide*.

### 3. Forewarned conference organizers and participants

Even with top-rated interpreters and equipment, things can still go wrong because of inadequate planning or insufficiently briefed participants.

As has been stressed above, conference organizers should have sufficient understanding of the workings and implications of the system, and should consult experienced interpreters well before the conference to plan ahead for all the services the meeting or conference is

likely to need, and to make sure these are properly integrated into a coherent whole.

At the start of any meeting, there are always likely to be a few persons unfamiliar with the system or unaware of it; it is therefore wise to have the chairman or one of the interpreters explain how it works. At round-table meetings, especially, participants should be reminded to speak into a microphone, to wait a second before starting to speak so that the technician has time to switch on the microphone, not to put their earphones close to a live mike or the whistle of feedback may startle the meeting, and to handle live microphones gingerly: a tap with a pipe or a cough is a head-splitting noise to the interpreters who generally need to have their earphone volume turned away up.

Since a meeting with interpretation requires a slightly higher degree of discipline than one without it, chairmen should be briefed ahead of time about practical points to watch.

Speakers may also be given a number of useful pointers to make sure they are communicating with their audience across the barrage of equipment they normally face nowadays. For instance, it still sometimes happens that communication is assumed to be a one-way affair. Earphones are only provided for presumed listeners. Then, all of a sudden, speakers or panel members find themselves left out in the cold when comments or questions are addressed to them in one of the other languages of the meeting. The resulting chaos and embarrassment could have been avoided by proper planning.

But North America is unhappily prone to a more serious failing. Conference organizers are usually generous to a fault about sparing no expense to provide interpretation for foreign delegations. Yet they are sometimes unaware that they go about it in a way that is almost sure to embarrass the foreign delegates, as if they were blamed for not having had the good grace or good sense to learn English. They may be herded together in a special corner of the room, the only area wired for the service; or pressure may be more or less tactfully exercised to encourage them to speak whatever English they possess. If they nevertheless still persist in speaking their own language, all kinds of disasters ensue. Their remarks may be perfectly interpreted into English by the available interpreters; possibly, sufficient listening-sets may even be available for all the English-speaking delegates; but no one has in fact warned them that these would be required, or how to use them. So, if a foreign delegate is important enough, pandemonium follows while everyone tries to find and fiddle with a listening-set. And even at best, the delegate will be faced by the embarrassment and inconvenience of having to repeat his remarks all over again. At worst, he will suffer the indignity of having no one apparently care to find out what he is talking about. This kind of thing has actually been known to happen at meetings designed to promote international goodwill and understanding! In Canada, since the advent of the bicultural era, such incidents are unlikely to recur; but there are surely French Canadians with memories of similar experiences still present in their minds.

To prevent major and minor mishaps of this and other kinds, it is necessary to dovetail interpretation requirements with the general working arrangements of the meeting. This is normally the responsibility of the chief interpreter or the interpreting consultant engaged to organize this service.

In his Report to AIIC's 1963 Assembly, its then president, Constantin Andronikof, neatly summed up the various requirements mentioned in this chapter:

Malgré tout ce que nous en disons, la profession reste mal connue, peu comprise, insuffisamment appréciée. D'abord, parce qu'elle est trop souvent mal exercée. Ensuite, parce que les délégués et les organisateurs ne parlent ni n'organisent pas toujours bien.

L'incompétence fréquente des interprètes ne doit pas nous faire négliger celle, non moins fréquente, de ceux-là. La qualité de la prestation dépend de ces deux facteurs, encore qu'à des degrés divers. Il appartient à l'A.I.I.C. d'éduquer le monde des conférences, y compris certaines organisations inter-gouvernementales, dans l'intérêt de la profession autant que dans celui de la coopération internationale, que l'article premier de nos Statuts nous impose de servir. Nos mementos, nos règles techniques y visent. Le Code, qui nous lie, est net à cet égard.

Mais il nous faut d'abord nous éduquer ou nous rééduquer nous-mêmes. Il nous faut exercer notre métier avec rigueur, nous interdire toute complaisance, tout à-peu-près.

En outre, pour assumer à bon escient notre rôle, qui après tout, est public par définition, il convient de ne plus raser les murs et de sortir de l'anonymat auquel nous condamne la réclusion des cabines aux verres fumés, situées à une altitude abstraite, dont sortent souvent des voix impersonnelles, ânonnantes et désincarnées. On ne défend bien la qualité que lorsque l'on se sait en cause.

### *A. Historical Background*

Interpreters have been known to claim, in unguarded moments, that theirs is the second oldest profession in the world. But interpretation in its present form is barely more venerable than the array of new specialties spawned by the cybernetic revolution. As a profession, interpretation is a descendant of the democratic process that led to popular franchise and to national self-determination; but it is also a sibling of the technical revolution that has, practically before our eyes, shrunk the world and made instant communication both possible and pressing.

Ever since semantic confusion presumably first developed around the Tower of Babel, interpreters of sorts, haphazard travellers, soldiers, merchants and noblemen, were pressed into the service of kings and generals, or of missionaries and envoys who had to venture into foreign lands.

But from time to time throughout history, successive civilizations saw the flowering of a lingua franca that helped exchanges, consolidated power, increased wealth, and promoted learning. After Greek and Phoenician, for instance, Latin knew two such periods of glory, while the latest full cycle could be seen in the use of French as the language of the courts and diplomacy in the eighteenth and nineteenth centuries. The Congress of Vienna, that glamorous precursor of many a later international gathering, had an edge over our more sophisticated multinational assemblies; it used French in all its proceedings. It was with the advent of popularly elected statesmen, such as Woodrow Wilson and David Lloyd George, not educated from early childhood to shoulder their countries' international responsibilities, that language problems began to complicate the multiplying network of international relations.

The 1919 Versailles Conference marked the beginning of an era. A generation of brilliant consecutive interpreters developed and performed in an aura of glory at the League of Nations.<sup>1</sup>



After the Second World War, the Nuremberg Trials launched another epoch, that of simultaneous interpretation, which has gained momentum since then. A series of factors made the moment ripe for innovation. Harried lawyers were searching for ways to lighten the burden of the trial's tiresome multilingual procedure; American technical inventiveness was stimulated by a primitive, trumpet-like system already used by the ILO before the war for whispered simultaneous interpretation; and eventually a Canadian ex-RAF bomber pilot, who was an audio engineer and happened to be working on radar research in England, was drawn into designing an intricate network of cable-connected microphones and earphones for the unprecedented and mystery-shrouded job. A scattering of prewar old-guard interpreters and a chance array of likely polyglots were thrown into a series of glass-fronted booths to cope as best they could with the first attempt at English-French-German-Russian simultaneous communication. Unbelievably, it worked.

The extent of the recent proliferation of multinational meetings is seldom realized. In 1858, two international conferences were held in Europe. In 1958, a count of official international meetings revealed that 1,452 such meetings had been held in 26 European and North American countries, 17 Latin American countries, 20 African countries, and 18 Asian and South Pacific countries.<sup>2</sup> Barely half a decade later, some 120 countries are active in the international circuit; conferences held each year across the world well exceed 2,000—not counting the galloping number of informal meetings of which there is no official record.

### *B. How Interpreters Are Organized Today*

Small wonder, then, that there has been a steady growth of demand for more and more conference interpreters. As late as 1958 they formed a small and select band of some 250 internationally recognized professional experts. By 1969 they numbered close to 800. In addition, there are probably twice as many practising interpreters throughout the world who do not belong to the two international associations that set standards for the profession: the prestigious, worldwide, Paris-based AIIC, and TAALS with headquarters in Washington.

Europe still has the largest concentration of interpreters in the world, as well as the longest experience in the field; North America is a close second; but interpretation is also taking root in other parts of the world. Latin America is in close touch with Europe and North America. On the other hand, the Soviet Union, and the Communist-bloc countries (Yugoslavia, Poland, Czechoslovakia, and so on) are a world apart, but are trying out interesting new approaches to interpreter selection and training. Interpretation is also making headway in Asian countries such as India, Japan and mainland China. The Parliaments of Ceylon and Singapore introduced interpretation before the Canadian Parliament did in Ottawa.<sup>3</sup> Big conference centres are developing in cities such as Tokyo and New Delhi, but

despite the distances involved, interpreters there still tend to be recruited from Europe and North America. Teams of local interpreters will no doubt eventually become established on the spot. The many meetings in Africa and the Middle East still largely draw upon the European pool for their interpretation requirements.

### 1. *Worldwide*

All along, since the late 1940's when a professional association was first mooted, AIIC has been the pacesetter of the profession. It has promoted exacting standards of professional quality, so that belonging to the Association has tended to be a hallmark of recognition and standing, and is the best way an interpreter can choose to work anywhere in the world he wishes.

AIIC has so far been not a federation, but an association of individual members who set their policies at annual assemblies, and elect a council and an executive secretary to carry on their business in the interim. It has elaborated the *Code of Professional Conduct* (see Appendix E) which members bind themselves to follow; it sets minimum working conditions and fees; publishes a yearbook<sup>4</sup> listing members' names, addresses and language qualifications; and produces studies on subjects important to the profession—statistical data and market trends, evaluation of training methods and standards in schools of interpretation, rules for entry into the profession, standards of quality such as criteria for language classification, work load, fair treatment of members including non-discrimination, health and social security, and so on.

AIIC thus safeguards the interests of its members and also (in accordance with Article I of its constitution) provides conference interpreting with an international frame of reference; it assists international cooperation through guaranteeing the professional qualifications of its interpreters.

Among AIIC publications available upon request, the following are worth mentioning: a pamphlet offering professional guidance for would-be interpreters (*L'Interprète de conférence: son rôle, sa formation*)<sup>5</sup>; a series of reports and resolutions dealing with schools of interpretation; a study on the problems of language classification (DA/9/08); a study on occupational health in the profession; reports on developments in the profession and on market requirements and trends; and a pamphlet prepared for the Union of International Associations.<sup>6</sup> Also available are the latest AIIC and TAALS yearbooks, giving alphabetical and geographical listings of members.

### 2. *North America*

TAALS<sup>7</sup> is more a regional than a worldwide organization, and as such is particularly concerned with working conditions in the Americas; but it cooperates closely with AIIC.

For professional purposes, North America is generally regarded as a single entity; but in fact it consists of three main conference centres each with its own concentration of interpreters and its own

characteristics. The largest is the New York/Washington area, with about 100 professional interpreters, including the large permanent United Nations and American State Department nuclei and a sizable number of free lances. Next comes Montreal, with some 30 professional interpreters (most on the permanent staff of ICAO, with less than a dozen full free lances in 1969). In addition, there is a group of some 20 parliamentary interpreters in nearby Ottawa. Mexico City has the next largest concentration of interpreters; the precise number (apart from six AIIC members) is rather difficult to determine, as conditions seem to be fairly fluid, with largely unpredictable quality and performance.

### 3. *Canada*

Beyond serving as a centre for international conferences, Canada has also developed, largely owing to the Quebec *risorgimento*, a sizable intra-Canadian market for free-lance interpreting. Its special characteristics are described in Chapter VI. As regards organization, there is no separate Canadian interpreters' association, since AIIC and TAALS satisfactorily meet current professional needs. The Société canadienne des traducteurs et interprètes (STIC) does exist, it is true, but it predominantly groups translators, with only a few of the Ottawa interpreters belonging to its Ontario branch (ATIO).

Canadian interpreters should now begin to think about collecting some data on their work, so as to evaluate trends and gauge future requirements in Canada. Although statistics are collected by AIIC, they are worldwide and do not reflect the development of particular markets. Since Canada, as explained above, presents rather a special case, it would be quite enlightening, and not complicated, to gather information on geographical distribution of work, peak periods in the year, proportion of languages used, and so forth. This information would be of special significance in the future planning of interpreter-training programmes in this country.

The information in this chapter comes from personal experience. It is based on conditions in the late 1960's but goes back to the period, a decade or so ago, when free-lance interpreting in Canada was an amateur undertaking. An interpreter working alone, in one-to-one situations and for a duration, was expected to produce what was considered to be a perfect interpretation. Since then the situation has improved though it is still far from perfect. This is an attempt to present it the way one feels it is today and not as it was in the past. It is not intended to be a history of the profession but a description of the current situation and the way it is being handled.

### A. Training

There has been a consistent shortage of qualified conference interpreters in Canada. This is not a specifically Canadian problem as good interpreters are everywhere in high demand and will probably continue to be scarce, but Canada is still lagging behind other countries in what is being done to remedy the shortage. The question of training competent interpreters, however, warrants a chapter to itself. (See Chapter VII.)

### B. Appraisal of Quality: Audience Reactions

As has been explained elsewhere, interpretation is still relatively new in Canada, and people are not yet quite sure how to use it. Many regard it with slight, almost wonder, like a virtue test. The fact that they wouldn't attempt to do it themselves removes it from the range of their critical judgement. Instead, in a better position to evaluate its quality but one may have had an unfortunate experience or two, write it off as a valiant attempt of limited practical value, or as one of the more tedious ways of getting the message of interpretation. The point is that, even though the quality has been improving, it is still off, and even though the quality has been improving, it is still off.



interpreters acquire more experience and apply themselves to raising their own professional standards, there is only now beginning to emerge the kind of critical response that is essential to the provision of a satisfactory service. Several fairly regular users of interpretation, the CBC, some Royal Commissions, Expo 67 while it lasted, and one or two medical associations, have just begun to keep an eye cocked for interpretation that is effective, as distinct from that which is not, and are taking a gingerly interest in learning how to discover and secure good interpreters and reliable equipment. But the great majority still look upon interpretation as a gift of the gods, to be taken unquestioningly, with faith, hope, and charity.

The reaction of Canadians offers quite a contrast to that of Europeans, who have no compunction about bestowing praise or criticism where it is due (when they are the listeners); and about listening to determine whether the interpretation is doing its job, even if they don't need it (when they hold the purse-strings). This difference may be due in part to a psychological factor. The Frenchman generally regards it as a feather in his cap to know no language other than that of Racine and Sartre. The Englishman or Italian has no deep-seated guilt feelings about not understanding Spanish or German. On the other hand, in Canada these days the non-French-speaking majority especially, feel unhappy and a little ashamed about not being "bilingual." They hate to be seen at a meeting wearing earphones. Even the little white button and cord is a public admission of incompetence, a symbol to be self-conscious about, like a dunce's cap. A person who doesn't need it tends to treat it with remote superiority, and wouldn't be caught using one of the things (even Gallic curiosity succumbs to Anglo-Saxon one-upmanship). A person who does need it will go to all kinds of lengths to convince himself he can really get by without the gadget. It therefore takes quite a conscious effort to overcome what is an often unconscious resistance, a reluctance that only disappears once a group of people have become confident they are truly being helped to communicate better.

### *C. Differences between French and English Speakers and Audiences*

There is also another inherently Canadian difficulty that has made it more complicated for the uninitiated to evaluate interpretation. It is the different make-up of both speakers and audiences. In the mid-1950's the problem arose in relatively simple terms. A few organizations were just beginning to explore the possibilities of a new device to improve their meetings. The so-called international labour unions realized that a good proportion of their Quebec members did not understand the speeches that labour leaders from outside Quebec came to deliver at Quebec meetings; several associations of medical specialists launched an effort to attract more French Canadian doctors into their ranks; a few companies discovered they made better sales in Quebec when they pepped up their distributors in French; and they all turned to the wonderful new gadget just appearing

on the market, whereby everybody at the big conventions might be made happy. Everyone could of course just go on speaking English as always: but even the "little guys" from Rimouski and Trois Pistoles would be given a chance to follow.

Then, what with one thing and another in the province, a curious new trend began to develop. More and more of the educated French Canadians, the ones who make speeches at meetings and who, as everybody knows, speak perfectly good English, started choosing to speak in French. As late as 1958 or even 1960, I fail to remember any instance of a French Canadian addressing his substantive remarks to an English Canadian or a mixed audience in anything but English. The last instance I recall of an active effort to discourage French Canadians from addressing a Toronto audience in French (even though simultaneous interpretation was actually there for the using) was at a meeting of the Canadian Association of Mayors and Municipalities in 1962.

A striking picture of the extent of change takes me back to the first labour meeting I ever attended, some ten years ago. It was an educational seminar for union organizers, a weekend meeting held in the Laurentians. French was mainly spoken outside the conference hall. All the talks were given by English-speaking officers or guest speakers, often from outside Quebec. A quarter or less of the French Canadian audience of 30 to 50 *syndicalistes* listened through the interpretation (when the primitive, homemade system used then did not break down). Today, I am writing these lines in the Laurentians, again at a union seminar where I see many of the same faces around me. The meeting is bigger; the equipment is better; the direct, sturdy, human companionship is the same; but practically everything happens to be going on in French. In a group of 100-odd, perhaps four or five follow the proceedings through interpretation and speak English when they have comments to make.

The change has happened imperceptibly; this is not a conscious, deliberate, nationalistic choice. The people's main concerns are practical, economic, not intellectual; nor are they trying to "ride the wave." Quite simply, the air they breathe is different; and they are responding to a strong and genuine need within themselves that lay latent a scant decade ago.

The new trend has had a curious effect on simultaneous interpretation from and into Canada's two official languages. When an English speaker addresses an audience of Canadians some of whom do not understand English, the chances are that at best, he is helpless at making himself understood by everyone in the audience, and at worst, indifferent to it. He has to rely on the interpretation. If it is good, so much the better. If it is bad, he has no way of knowing; and besides, it doesn't matter too much. The Rimouski boys aren't likely to notice, and even if they do, they aren't too likely to complain. As to the new young breed of French Canadian professionals (who increasingly rely on French in their work, and are taking a fresh delight in it) they have no difficulty in understanding the English part of the proceedings, and are too busy with the subject at hand,

to bother checking on the interpretation.

Something quite different happens when a French speaker addresses a mixed audience. The chances are he will soon find out if his English-speaking audience hasn't been following him. All his opposite numbers—the big shots, the ministers, the company presidents—are completely at the mercy of the interpretation. And most of the time he isn't in the least helpless: he can ignore the interpreters and turn around and explain whatever the French failed to convey in extremely competent English.

The point still often overlooked, however, is the extent to which it is unfair to expect a speaker to impress an audience in quite the same way, when he is forced to use a language other than his own, as he could do by using his own. Ease, fluency, fire, brilliance, anger, wit, irony, competence are all impeded by a tinge of accent or even a tiny effort at finding the right words; and if the foreign accent or syntax is marked, if the speech is laboured, the image of the speaker in the audience's eye may be quite distorted—quaintness may overshadow even outstanding eloquence, cultivation, or conviction. This is perhaps yet another of the many factors that have, over the years, reinforced in English Canadian minds, the myth of the alleged singularity of the French Canadian educational system.

The interpreter's role, then, is to convey not only the speaker's meaning, but also his tone and personality to the members of the audience. They must sense the message as if they were getting it directly from the speaker. In fact, they already have the advantage of seeing the speaker perform at his best, and they can, to some extent, hear him directly. The interpretation is there to help them understand fully what he is saying and how; and this combination of conscious and subliminal messages should project the impact of the speaker's personality and his full meaning more clearly, more genuinely, than if he were speaking a second-best language. Ideally, of course, this presupposes great receptiveness of mind in the interpreter, a knowledge of the speaker's background, a ready grasp of his ideas, an ability to tune into his mood and emphasis, as well as qualities of speech not too far removed from his own. The touchstone will be this: did English listeners manage, through the interpretation, to get a fuller, more spontaneous understanding of, say René Lévesque, than he would have conveyed had he been speaking English rather than French? This is no mean criterion to have to meet; but anything less surely misses the point.

Since 1960, there has been a marked trend in Quebec to use French increasingly in public; and there has been a tendency to rely more and more on competent interpretation from and into the two languages. In the other provinces, however, in which interpretation is now gradually spreading, the situation tends to be similar to what it was several years ago in Quebec. The bulk of interpretation is into French, with quality fairly low on the priority list; while whatever little interpretation there is into English may not fall far short of perfection.



For instance, the Royal College of Physicians and Surgeons is a national body that generally did not provide interpretation at its meetings outside Quebec; but it decided to do so at an annual three-day meeting in Toronto in 1965. However, of the 40-odd scientific papers, all but three or four were delivered in English. The French interpreters (good ones) were overworked, yet no one seemed to be listening to them. Even if one or two people in the huge audience did depend on the interpretation, it never occurred to them to come up to the booth and say so. Being human, interpreters will often work hardest and best just for the benefit of a single delegate, provided they know he relies on them. On the other hand, they don't particularly enjoy working just to keep the air moving. So, at the meeting in question, the French interpretation tended to fall below par a good deal of the time; and I can well imagine a French-speaking doctor, shortly before his turn to deliver a paper, picking up some earphones to see whether the interpretation was any good, and, failing to appreciate the rendering of the scientific information being conveyed at that particular point, proceeding thereupon to deliver his paper in English. Then when the time came for the odd French paper to be delivered, probably three-quarters of the audience didn't even have earphones to listen, so the fact that the interpretation happened to be competent was largely academic, and must have left the speakers as frustrated as the interpreters.

A special kind of experience often tops off this kind of meeting. The interpreters are silently chewing themselves up for having done a miserable job. Unfailingly, at that moment, some well-meaning, innocent soul rushes up. Dazzled by the long, steady flow of foreign sounds, he cannot restrain his admiration: "I just don't know how you do it!"

Such maverick encouragement is by no means uncommon. On its strength, many a would-be interpreter, his flagging spirits revived, has fiercely determined to cling to a profession for which he was signally unsuited.

The remedy, of course, is to be rigorous in assessing the need for interpretation—where there is no need, it is likely to be bad and therefore worse than useless; but if interpretation is used, make sure that all the conditions, as outlined in Chapter IV, are fulfilled, so it can perform the job of communication properly.

#### *D. The Mirage of Equilingualism*

Another result of the relative Canadian inexperience with the tool of interpretation and the lack of critical assessment of its performance, is the common assumption that an interpreter is like a tape recorder: you feed something in, press the right buttons, and out come the sounds in English, French, or whatever language may be needed. Actually, computers are now being developed that may one day manage to do this job—but for the time being we have to depend on the transistors and electronic circuits in the human brain which as yet



does not lend itself to this kind of programming. As explained in Chapter IV, interpreters work with their active and passive languages according to a stringent classification; and even those who work with just two (and the two best known throughout the world, English and French), rarely have an identical level of proficiency in both. This is not a constant pattern, imprinted upon the brain for all time, but depends a great deal upon environment, use, and even immediate circumstances. Proficiency in both active and passive languages is improved through use; but the degree of proficiency interpreters need in their active languages in particular, must measure up to standards much more exacting than for current conversation or communication. Achieving such proficiency is something of a feat; maintaining it, or not allowing it to deteriorate, is another.

Curiously enough, this is especially so in bilingual or multilingual countries. Everyday use of more than one language seldom does much for the purity of either. Familiarity may not breed contempt, but it does blunt sensibility. Respect for language may never be a very common phenomenon; but in bilingual countries it seems to fall to the lot of tiny groups of belligerent, dedicated people.

Thus, in countries like Canada, most people just take it for granted that anyone "bilingual" operates both ways with equal ease and at all levels of complexity. Current conversational bilingualism is used to judge working standards of proficiency. Every other day or so, the *Montreal Gazette* blithely carries advertisements for girl Fridays who will translate publicity material as well as more abstruse texts "from English into French and French into English" for such unsuspecting employers as, for example, manufacturers of pharmaceutical products. Perhaps if one of the languages involved were more esoteric (say Japanese or Urdu) "equilingualism" would less happily be taken for granted.<sup>1</sup>

But, as it is, this common attitude also trickles through into fields of activity where it represents a threat. Conference interpretation is one of these: as explained earlier, there is no room in it for complacency about language. Too many French-speaking interpreters in Canada unhesitatingly interpret into English as well (the opposite practice is not as widespread in North America, for reasons mentioned below). Too few interpreters are intransigent about the standards of their active language or languages. Too few listeners bother to distinguish good work from poor. The result is much drab mediocrity in a job where this is, by definition, self-defeating. Of course an interpreter can work into his second-best language, and can often get by. As long as he is dealing with commonplaces, things go swimmingly. Then, something more demanding comes up—difficult working conditions, or a finely reasoned argument, the rare speaker who manages to combine wit and elegance, or has a rapid-fire delivery, or uses the thin edge of irony—and the interpreter is left floundering far behind, unable to relay both the sense and the form. This is fair to neither speaker nor audience; in fact it is not interpretation.

There is, of course, a practical problem involved. Particularly in Canada, where two-language meetings are the rule, interpreters having an A rating in both English and French have a distinct edge over their colleagues with only one of the two, and are of course, likely to have more work. This is a strong (and perfectly justifiable) enticement to Canadian interpreters to try to become equilingual. But in practice, looking at those interpreters in Canada who can truly boast of having an active command over both the official languages (and they are, comparatively, but a handful) one should not overlook the fact that most if not all of them perfected their second language by living or studying abroad: in France, or in England or the United States.

However, a point not to be glossed over still remains. What are we to do when interpreters raised outside Quebec are confronted by the rich colloquial expressions, the broad accent, that are still very occasionally heard in public in this country? On that subject, the Chief Parliamentary Interpreter Raymond Robichaud writes:

Originally ... it was all very well to have French-Canadian Members [of Parliament] interpreted into impeccable English with the proper accent, but it was quite another matter to have the interpreter actually say in English what was being said in French. What is preferable? To have a speech on some local Quebec problem inaccurately interpreted into flawless and idiomatic English or rendered, with almost perfect accuracy, in poorer, though adequate English with a slight French-Canadian accent?<sup>2</sup>

No one will hesitate to place accuracy ahead of diction. The problem does, however, point up a real, if geographically circumscribed, weakness in the present language classification system. Perhaps what is needed is some supplementary rating, such as: French (Quebec) or English (southern United States)?

As was earlier pointed out, having or achieving a necessary language proficiency is one thing, but maintaining it is another. Especially so in an environment that only intermittently pays any attention to this point; and all the more particularly in North America with its huge imbalance between the amount of English in use as compared to French.

No less than translators, no less than writers, interpreters need living roots for their active languages; and in volume alone, even in Quebec in the mid-1960's, not to mention the rest of the Western hemisphere, there is less authentic French than authentic English to draw upon "live", in every field, from books, magazine ads, shop labels and mass media, to scientific papers at learned society meetings. In other words, surrounded by this sea of Englishness, French interpreters will, after a time, acquire English with little effort, and come to consider it as one of their active languages. Short of consciously applying themselves to the task, English interpreters will never, in a largely English-speaking setting, acquire French in this way. (Incidentally, this is a field where achievement is often inversely proportional to effort, however immoral this may sound.)

On the other hand, English interpreters have the current running in their favour as far as their standards are concerned: there is no dearth of material around them to keep abreast of the latest turns of current literary or scientific language. By contrast, French interpreters have more of an uphill battle to face; they have to be infinitely more intransigent about not allowing their French to be contaminated by the English that is constantly used around them; they have to dig deeper to keep up-to-date; and they are seldom helped by their French Canadian audiences who do not provide the incentive of being discriminating, that is both demanding and appreciative.

It follows from all the above, therefore, that there is need, in Canada, for a better understanding of, and greater respect for, the difference between an interpreter's active and passive languages. But even at best, assuming utopian comprehension, an occasional practical problem remains: it is in practice extremely difficult to foresee accurately and unfailingly the actual proportion of English and French that will be spoken at a meeting. It may therefore occasionally happen that an interpreter has to help out an overworked colleague, and pinch-hit into a less-than-active language. Since this is a strenuous, and indeed generous, thing to do, the interpreter tends to pat himself on the back and regard his work as a splendid accomplishment, rather than recognize it for what it really is, a compromise, a lesser evil, acceptable only where its relative advantages clearly outweigh its inherent risks. The Canadian approach towards bilingualism encourages easy versatility. In interpretation, much more attention needs to be given to cultivating one-way excellence. This should especially be remembered when training future interpreters.

#### *E. The Mountain of Cost*

Here again, Canada is not unique in facing the problem of the inherently high cost of simultaneous interpretation. However (as compared to big international meetings where interpretation is but a fraction of the total costs incurred, and is often part of the largesse extended by the host country to foreign visitors) in Canada, interpretation often represents the largest slice in the organizing expenses of national meetings, and is a service imposed by the bilingual character of the country.

It happens, therefore, that some organizers of Canadian meetings think interpretation a luxury beyond their means. They occasionally try to cut costs by turning to bilingual students or employees, or even to translation firms or language schools. But the risks are high that such interpretation will fall short of usefulness. This is not very serious in the case of meetings that only require interpretation as window-dressing, a symbolic gesture towards French Canadian members who don't need it anyway (even though such conscience money, hardly trifling even at cut-rate prices, could have been used more constructively elsewhere). It is sadder in the case of meetings



where interpretation is really needed. Cheaper, substandard interpretation is no solution, however hard up an organization may be. Sometimes interpreters feel sufficiently at one with a cause to donate their services free (for example, to the Canadian Cancer Society, to the Voice of Women), but these are isolated instances. Parliamentary interpreters are also, on occasion, loaned free of charge to government-sponsored meetings. But in a country with two official languages, it is reasonable to suggest that the government might bear some responsibility for providing interpreters and possibly equipment, to national organizations that need the service but cannot get it for themselves (either because they cannot afford it, or because the demand exceeds the supply). In fact, some such assistance is already forthcoming either more or less directly, through CBC or Canada Council grants to specific meetings, or indirectly as in the form of tax relief to pharmaceutical companies that have financed interpretation facilities for medical meetings.

A very relevant point was raised at the Commission's Toronto hearings in 1965. One of the Commissioners, Royce Frith, asked the Canadian Book Publishers' Council (in connection with paragraph 5 of their brief) about the possibility of reducing the cost of translation in the future through training a larger number of talented translators. As explained in the reply, the problem lies not so much in a shortage of talented translators, as in a shortage of competent people willing to undertake the work, even at the apparently high rates offered. There is no point in trying to lower rates to levels paid for clerical work. This answer also applies to interpreters: while the law of supply and demand does have some relevance, the question basically is that of paying enough to attract or induce people of the right calibre to do this job, people who by definition are also in high demand in other fields and professions.

The emphasis here, as undoubtedly in many other areas, must be not so much on training translators and interpreters as on educating a great many well-rounded bilingual people. For whatever it may be worth, this limited practical evidence is adduced in support of sound education, including a working knowledge of more modern languages than one, geared to the growing demands and interrelationships of today's world. While it is doubtful whether widespread active bilingualism is feasible or indeed desirable, passive bilingualism should be an educational goal throughout the country. If enough well-educated people, able to understand both languages and to use one of them well, are produced in Canada, not only will there be less demand for translation and interpretation (which are crutches at best), but there will be a larger pool of talented people to draw upon—among writers, lawyers, journalists, researchers—for whom translation or interpretation might be a meaningful side-line or even an open door, providing a wide range of experience useful to any career.





### A. Past and Present Trends

Conference interpreting requires certain inherent aptitudes: intelligence, quickness of mind, adaptability, empathy, a feeling for words, linguistic ability, clarity of expression, and a good dose of physical health and mental resilience. It also requires a number of acquired characteristics: a knowledge of languages, a well-trained mind, a broad store of knowledge, and a certain amount of experience and maturity. Finally, a good interpreter needs training and practice in the actual skills of interpreting.

All this may sound quite exacting. It is. Nowhere is this seen more clearly than in the fact that, out of the hundreds of would-be entrants into the profession each year, very few will actually become conference interpreters. One of the reasons is that a good interpreter has to have intellectual capacities not too far removed from those of the people for whom he is interpreting; and, for top-flight conferences, which all qualified interpreters are in theory supposed to be able to handle, the range becomes understandably narrow. At many, if not most, international meetings, a fair proportion of the world's best brains in any given field is likely to be present; consequently the overall standards of a profession which is essentially geared to international meetings must measure up to exceptionally exacting requirements.

Hence the paradox that, despite the limited openings available every year for new conference interpreters (at present about 50 a year throughout the world, including international organizations and the free-lance markets), and despite the enormous number of hopeful entrants into the profession, there is still an appreciable scarcity at the conference level where a high quality of service is required. Exacting employers are by no means enjoying an *embarras de richesse*.

However, it also happens that, in the complex mesh of today's affluent society, there are many meetings in addition to top-level ones. Practicability and cost are no longer major obstacles to solving business and other problems through travel and improved

methods of communication with people abroad. Such communication will often rely on conference interpretation, frequently of a fairly routine nature and requiring no more than average levels of talent and proficiency. It is clear, therefore, that there is room in the profession for more than just top-flight interpreters. This point is however not generally recognized as yet, and no intelligent way of coming to grips with it has been worked out within the profession or outside. It is somewhat analogous to the hassle, in another field, between general practitioners and specialists. How can the surgeon, in all fairness, treat patients for influenza, when the G.P. is expected to refer surgery cases to him?

Possibly somewhere at the root of the problem with interpreters lies the fact that, at the "specialist" level, they generally combine two contradictory traits: outstanding ability, and fairly low drive. If they combined high ability with high ambition, they would probably be sitting at the conference table instead of in the interpretation booth. Of course there do happen to be ambitious, aggressive people among interpreters too; and some get to the top, at times, in other professions than their own. But by and large, interpreting is an occupation in which aggressiveness is liable to be inversely proportional to talent, and seldom makes up for its absence. Hence, also, the amount of pent-up frustration characteristic of this way of life.

Since conference interpretation is such a relatively new phenomenon, the early days of amateur status and trial-and-error experimenting are still part of the experience of many present-day interpreters. Conditions have, in the meantime, changed; but it is still true that many of today's best interpreters have never had any formal training for their work: they had to discover all the hows and whys for themselves as they went along. They are mostly people who just happened to have the right combination of talents, were more or less accidentally drawn into a form of work that somehow evolved during the present century, and who gradually sharpened their skills to match new technical requirements. Working side by side with an intelligent, and preferably experienced, interpreter, is still one of the best ways of learning and improving one's skill. Indeed, this is a profession where the learning process never stops. Even old hands get something new out of every conference—perhaps no longer just improvements in working techniques, but always a broadening knowledge of the world and of the people around them.

Today, however, a new generation of bright young interpreters is more and more coming to the fore in Europe. A growing number of new entrants into the profession are not, as in the past, self-made, but have graduated from schools of interpretation, where experienced interpreters have helped to steer them along the right lines. For example, in the Sorbonne's *École supérieure d'interprétation*, a faculty of experienced practising interpreters helps today's students off to a wonderfully promising start by passing on to them the knowledge and experience it has taken years of practical work to acquire. This is done by carefully selecting those applicants who will have a chance to make the grade, giving them the necessary know-how and practical

training, in effect helping them to develop proven short-cuts, the handy conditioned reflexes that will give them time and leeway for the more difficult manoeuvring required by the original thought, the unexpected phrase, or the unaccustomed word. Students are also helped to recognize routine pitfalls and to avoid painful mistakes and unfortunate working habits; then, once they have qualified, they are sponsored professionally within the conference circuit. Nothing comparable is as yet happening in America.

A special feature of this profession is that, during an actual meeting, no special allowances can be made for a "beginner"; it is sink or swim from the first, and the neophyte interpreter has to be good enough to shoulder his own share of responsibility in the team with which he is working. Hence the usefulness of training, and above all the special importance of simulated practice, as well as, naturally, discrimination in grading the difficulty of the actual in-service experience a beginner can be given at first.

AIIC writes in its pamphlet on vocational guidance for would-be interpreters: "Mais le débutant devra se rappeler que le métier n'est pas moins exigeant pour lui que pour l'interprète aguerri. En effet, dès les premières séances, l'interprète doit faire la preuve de sa maîtrise, aptitude rarement exigée dès les premiers pas dans d'autres professions. Il est jugé chaque fois par un auditoire auquel il doit rendre pleinement le service pour lequel on fait appel à lui. Le débutant devra donc éviter de vouloir se 'lancer' à l'occasion de conférences trop difficiles pour lui."<sup>1</sup>

## *B. Getting Launched and Work Opportunities*

This raises the question of how interpreters, beginners as well as veterans, are in fact recruited for free-lance assignments.

- 1) The big employers, mainly the UN agencies and other international organizations, have their own personnel departments, familiar with the AIIC and TAALS yearbooks that list professional interpreters alphabetically and geographically; and they also keep their own lists of free-lance interpreters whom they have found reliable and qualified. Because of the shortage of good interpreters, these agencies are very much on the lookout for promising beginners, and in fact often give them a certain amount of training. In North America, they offer the main opportunities for new recruits into the profession.
- 2) Otherwise, free-lance interpretation assignments are mainly a matter of contact between colleagues who are familiar with each other's qualifications, languages, and specialties. A few interpreters go in for "organizing"; they seek out information on future meetings, offer their services and if appointed as consultant or chief interpreter, get down to recruiting suitable teams. Except for big international meetings, however, this is a tedious and relatively unpopular task, and in fact, most conferences turn to a competent interpreter they happen to know and ask him in



turn to get in touch with suitable colleagues. If a conference has had no previous experience of interpretation, and knows of no sister organizations that have, it may ask for advice from the UN, the American State Department, ICAO in Montreal, or the University of Montreal. It is thus put in touch with interpreters who take it from there. To get work, therefore, it is crucial for a beginning interpreter to become known by his colleagues. Despite inevitable professional jealousies in a temperamental profession, true worth is still quite rare enough to be eagerly recognized. Not unexpectedly, however, flair, fine intentions, or high ambitions alone are meagre substitutes for competence.

### *C. Schools*

As was mentioned above, there is a marked disproportion between the number of people who want to make a career of interpreting, and those who actually reach their goal. It is estimated that every year in Europe alone some 20,000 students are admitted into a vast number of more or less reputable schools of translation and interpretation. Perhaps 100 of these eventually get interpreters' "diplomas"; and some 20 of them will in fact become practising interpreters. This staggeringly low survival rate (which is not, of course, the same for all schools) has been one of the objects of AIIC's concern and study over some years. A series of factors has been diagnosed as causing this obviously unhealthy situation; and AIIC has sought remedies by promoting solid educational standards and conditions in schools of interpreting, and by giving official recognition to schools that meet its criteria and train "viable" interpreters.

#### *1. Selection of applicants*

One of the main reasons for the meagre ratio of successes in so many schools of interpreting is an inadequate selection of candidates. Few schools apply rigorous selection criteria and yet these are the only fair basis for offering applicants an honest course of interpreter training. Indeed, one of the best ways of gauging the merits of a school is to compare admission figures with the number of practising interpreters produced. By that acid test, most schools rate a batting average of one out of every 200 students or so; the Sorbonne school is reputed to do considerably better, with a success ratio of one in 10 to one in five. Comparable figures for the other schools recognized by AIIC are not available to the author but it is unlikely that they are higher; while the London Working Party which is not even a school in the current sense, tops the list with a score of over five in 10. (*See Appendix B for details on this noteworthy experiment of some years' standing.*)

Another factor accounting for the disproportion between school admissions and new entrants into the profession is that only very few people are aware of the rigours of conference interpreting proper. Quite frequently, for instance, parents of teen-age girls, casting

about for careers that will tide their daughters over till marriage (their main provisional interests being "languages" and "travel") tend to think of "interpreting" as a broad generic term covering the various forms of translation, escort interpretation, bilingual secretarial work, and publicity or public relations in business dealings with foreigners. There are, of course, a great many opportunities here for people with linguistic interests or abilities; but while it is perfectly legitimate to offer training for such jobs, it is a very questionable and unfortunately widespread practice to gild the lily by offering so-called interpretation courses. Commercial schools, which need a sizable enrolment to stay in business, are especially apt to do this, and few of the hopeful students are knowledgeable enough to distinguish between vague general training of this kind and the demanding type of instruction which conference interpreting (in the real sense) calls for. The genuine teaching of conference interpretation is not a profitable venture. To provide a well-prepared, well-balanced course of study at the proper level for a small group of rigorously preselected students seems to require the usual academic safeguards, as is shown by the fact that all the accredited schools of interpretation are attached to reputable universities. They are: l'École d'interprètes et de traducteurs de l'Institut des hautes études commerciales de Paris, l'École d'interprètes de l'Université de Genève, l'École supérieure d'interprètes et de traducteurs de l'Université de Paris, and the Dolmetscher Institut at Heidelberg University.

In a good academic setting, moreover, the teaching of interpretation seems to be yielding an unforeseen dividend: it is proving to be a valuable tool for original linguistic research, and it creates laboratory conditions of some interest to current philosophy and psychology. The probing of how interpreters' minds function at work is helping to bring out into the open, and to throw new light upon, the nature of certain instinctive or learned responses, reasoning processes, analytical patterns, and emotional triggers or reactions.

A word of caution may, however, still be in order here. Conference interpretation is an up-to-date, practical, and fairly fashionable pursuit; even highly reputable linguistics departments may be tempted to tie it into their curricula to lend them a dash of glamour or a glint of hard-cash realism. But shoddy conference interpretation, whether at the training or at the practical stage, is likely to do neither. Therefore, before undertaking to offer interpretation courses, a university or any other institution with a reputation at stake would do well to consider very carefully the various essential factors involved, in the light of the specific circumstances which differ from place to place.

Now, from the student's point of view, if, after having had buckets of cold water duly poured on him, a promising young North American still wants to become a conference interpreter, where should he turn for specific advice? Outstandingly qualified applicants may well find it worth their while to apply to the main institutions that, on this continent, employ interpreters and provide some form of

interpreter-training: the United Nations in New York, ICAO in Montreal, the Bureau for Translations and its Foreign Languages Division in the Department of the Secretary of State in Ottawa, and Language Services in the Department of State in Washington. The institution that has longest offered interpretation courses in North America is Georgetown University's Institute of Language and Linguistics in Washington, D.C. In Montreal, the University of Montreal's Department of Linguistics, which had been offering some interpreter training for a number of years, now gives an introductory course on conference interpretation to students working for an M.A. in translation. The course is organized by experienced conference interpreters and is eliciting a great deal of interest. A number of other institutions are, reportedly, studying the possibilities of launching interpreter training programmes. These include Carleton University, Ottawa, Laval University, Quebec, and Bard College, New York State. One would hope that, at the very least, the linguistics departments of Canadian universities will become better acquainted with current needs and opportunities in the field of conference interpretation, and will thus be able to give students realistic guidance including information on scholarship possibilities abroad, such as the fact that the University of Paris is already cooperating in bilateral exchange programmes of definite interest to Canadians.

## 2. Admission standards and curricula

While experienced interpreters have a pretty good pragmatic idea of the kind of person who is likely to do well at this job, more objective research would be beneficial on the aptitudes and prior qualifications a would-be interpreter needs *before* he starts training, if he is to have a reasonable chance of success. Some such research was being conducted a few years ago in England and Yugoslavia but as yet no data appear to have been published. Pending the elaboration of a more scientific approach, AIIC has described the necessary aptitudes in its *Guidance Material for Future Interpreters* (see Appendix A; also B, C and D). AIIC also organized, in December 1965, a symposium on the teaching of interpretation. (The proceedings are available from the Association's headquarters, 33 rue des Archives, Paris 4e.) This provided a first, and much needed, opportunity for a general exchange of views and experiences, and for a comparison of methods and results in the various existing schools.

On the basis of the growing amount of practical experience, a consensus seems to be emerging on a number of points related to admission standards and curricula. Initially, the tendency was to regard interpreters as specialized translators, and therefore to require them to go through a full translator training programme before embarking on interpreter training. It has turned out, however, that this discourages or frightens away many of the most promising interpreter trainees, who are by temperament ill-suited for such a course.<sup>2</sup> It is more and more widely recognized that interpreters are best trained independently in relatively short, very intensive courses given to carefully screened applicants. Such training should



be at the postgraduate level, that is, the applicants should have an M.A. degree or the equivalent, in economics, history, law, science, etc., but not necessarily nor even preferably, in languages. It is also increasingly stressed that teaching languages should be quite distinct from training in interpretation. Courses on interpretation are a poor substitute for sharpening the mind on a recognized discipline; and they amount to a costly and imperfect method of teaching languages. Ideally, short intensive interpretation courses should be offered to university-educated persons who already have a sufficient mastery of two or more languages, and seem to have the right aptitudes.

By the time a person looks for training to become an interpreter, it is at any rate too late to teach him an "A" language: he should have grown up in it and studied in it to have a chance of ever making the grade. "B" and "C" languages can still to some extent be acquired at this point, but instead of spending three or four years in language and other classes at an interpreters' school, an applicant would generally do better to go off for an intensive year's language study, preferably at a good university in the country whose language he is studying. Canadian interpreters are relatively lucky to have both English- and French-language universities right in their own country; but they would nevertheless occasionally benefit from a thoughtfully planned trip abroad to limber up their "A" language.

An interpreter's languages must be geared to existing market needs: there are certain language combinations which, though interesting in themselves, will not in the foreseeable future help an interpreter to earn his living. French-Italian-Spanish, for instance, may not get an interpreter a job in Canada in half-a-dozen years. To survive in the Canadian free-lance market, an interpreter must have an A rating in either English or French and preferably at least a B in the other; and, preferably also, at least one B or C in Spanish, Russian, German or Portuguese (in decreasing order of practical importance). For the time being, at any rate, no other languages would be paying propositions in the North American free-lance conference circuit, though the United Nations and the American State Department employ a limited number of Russian, Chinese, Japanese, and other interpreters on their permanent staffs.

In Europe, the market appears to be nearing saturation point for certain language combinations. An experienced interpreter and much respected teacher of interpretation, W. Keiser, puts it this way (November 1965):

There are indeed still certain language combinations which are very much in demand even in Europe, such as real English "A's" with Russian or Spanish in addition to French; or, for the very important circuit of the European Common Market organizations, genuine French "A's" with Italian or Dutch in addition to German and English. On the other hand, *French-English-Spanish* and *German-French-English* are quite well covered . . . it being understood that outstanding conference interpreters will find work even in these language combinations.<sup>3</sup>



Obviously, schools of interpretation need to gear their training (and hence also their selection of applicants) to languages for which there will be an actual demand among employers.

The question, of course, then arises: what is the interpreters' school supposed to teach? Assuming the students have the natural aptitudes as well as the educated minds and the required language proficiency, the school should concentrate on teaching them the skills of rapid assimilation and accurate communication. It should also advise them about additional courses they may need to take in other faculties (for example, courses on economics, political institutions, international law, history, or even scientific or technical subjects) to supplement their previous education. In the interpreters' school the emphasis should be on developing mental grasp and agility, on creating an awareness of the thought processes involved in both direct oral communication, and communication across a language barrier—rather than on mechanistic transposition and automatic vocabulary drills, which produce unintelligent and often unintelligible reproduction of the original message. That is why the good European schools devote a great deal of time and energy to teaching consecutive interpretation first of all. This trains mind and memory in grasping the message, analysing it and only then in conveying it faithfully and clearly, as no amount of simultaneous interpretation can do. I was impressed, at the Sorbonne school, by the careful gradation of "consecutive" exercises in which the students' range of comprehension and skill is slowly built up; and by the passage over to simultaneous, with careful coverage of the various mental processes and practical skills involved, rather than the happy random hours of booth practice which are still the mainstay of the curriculum in far too many schools. "Ce qu'il faut leur apprendre sur-tout," one of the professors told me, bolstering this up by a series of vivid examples, "ce n'est pas comment rendre le terme, mais comment imaginer, vivre la situation." The results I had a chance to see were striking enough to make me wish I were back in school.

### *3. Contacts with practising interpreters*

Apart from high admission standards, a factor in the success of the best schools is the close link they have with practising interpreters. Not only are these schools thoroughly familiar with the current demands of the work, but they have a feeling for how students respond and can also bring them into direct contact with the real thing by taking them to live conferences, and by training them on suitable, up-to-the-minute material which keeps the students on their toes. This is the only way to produce graduate interpreters who can perform on a par with many an experienced old hand.

It is not too long a process; depending on standards of admission, and the intensity of the course, a year down to as little as six months seems a reasonable average. The experience of the London Working Party is of special interest in this connection. (*See Appendix B.*)

Although interpretation is a profession that requires, from its

entrants, a certain range of knowledge and maturity of mind, it is far from kind to the mature in years. The physical and mental stresses are intense; they are only now beginning to be studied. It is also work which requires unusual alertness and stamina. A number of interpreters are coming to believe that their best years lie between the ages of approximately 25 and 45. This is therefore an excellent "gateway" profession, and may help give a head start to young reporters, writers, diplomats, lawyers, college teachers, scientists and artists. It combines quite well with certain other occupations, such as journalism, teaching, writing, translating—and even housewifery (married women interpreters are, according to at least one study, among the allegedly happiest and most stable members of this motley crowd).

Interpreting is thus at times an absorbing, challenging and exhilarating avocation, at others a murderously inhuman serfdom, whose frustrations have to be worked off in other creative directions. It is still young enough to be opening up new trails, and to provide ample material for further study and analysis. It still carries within itself unresolved paradoxes; evidence may be found in comparing for instance, the suave remark of a past AIIC president: "Notre métier . . . nous offre une diversité d'informations et une ampleur d'expériences humaines sans pareil," with a series of less circumspect statements reported by *Newsweek* (March 15, 1965) which led to some anguished yelps and a flurry of denials.

But above the din and the music, it still remains true that interpretation is a tool of vast potential usefulness; and that, in a bilingual country such as Canada, wider familiarity with the prerequisites is necessary to bring the potential to fulfilment.









*Caractéristiques du futur interprète*

Seuls ceux qui connaissent déjà à fond les langues qu'ils désirent pratiquer professionnellement peuvent envisager de devenir interprètes. La parfaite maîtrise d'une langue exige que l'on se soit pénétré des traditions du pays où elle est parlée, de son histoire et de sa littérature, de la façon de penser, de vivre et de réagir de ses habitants; style, rhétorique, humour, idiotismes, clichés, accent et argot courant ne doivent plus avoir de secret pour celui qui se destine à l'interprétation. Cette connaissance doit être profonde, c'est-à-dire celle du linguiste et non du polyglotte ; aussi les interprètes de conférence utilisent-ils rarement plus de trois langues comme langues de travail.

Il est en outre indispensable que le futur interprète possède des notions suffisantes sur un certain nombre de sujets tels que l'histoire, la géographie, les sciences, l'économie politique, le droit, la procédure parlementaire, l'organisation de la vie internationale, etc. En effet, l'interprète doit être en mesure de suivre un débat sur n'importe quelle matière ; qui dit suivre ne dit pas nécessairement connaître, mais implique la faculté de s'adapter au sujet ; l'interprétation exige, en effet, une très grande disponibilité d'esprit.

Capable d'analyser et de comprendre rapidement les idées de l'orateur, l'interprète doit aussi posséder la vivacité d'esprit et l'éloquence qui lui permettront de les transposer instantanément. Chacune de ces deux particularités est assez répandue, mais il est rare qu'elles soient réunies chez une même personne ; c'est ce qui explique que le nombre des interprètes professionnels reste faible par rapport au nombre des linguistes.

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\*Extracts from *L'Interprète de conférence : son rôle, sa formation* (Paris, November 1964).

Interpréter suppose la maîtrise d'un vocabulaire étendu et très différent d'une conférence à l'autre. Si, pour certaines conférences, l'interprète doit apprendre une terminologie spéciale, ce qui nécessite un effort renouvelé de mémorisation, il lui arrive à tout moment d'avoir à rechercher un terme ou une expression au fond de sa mémoire, il doit donc disposer d'un "bagage" très complet.

Autant d'impératifs intellectuels, auxquels s'ajoutent des impératifs caractériels : solidité du système nerveux, faculté de se détendre ; le métier comporte de longues périodes de concentration et de tension, et quelle que soit la durée de la séance, l'inattention est interdite à l'interprète. Il lui faut pouvoir ensuite récupérer, se remettre en disponibilité.<sup>1</sup>

Il devra également faire preuve, outre de la discrétion professionnelle de règle formelle et absolue, de discrétion vis-à-vis de ses collègues, de patience, de sens de la mesure, de sens d'équipe. S'il est probablement superflu de préciser que la conscience professionnelle de l'interprète lui enjoint d'observer une scrupuleuse fidélité et objectivité à l'égard de chaque orateur, il faut par contre rappeler qu'une certaine assurance est nécessaire. Il ne lui suffit pas d'être sûr de son interprétation, il doit également inspirer confiance : l'interprète est tenu d'observer une complète neutralité intellectuelle dans l'exercice de ses fonctions, mais il doit savoir persuader, autant que son modèle, mesurer ses gestes et sa voix, préciser sa diction, en un mot "passer la rampe".

### *Formation*

Ces impératifs définis, reste à découvrir les personnes qui y répondent et à leur ouvrir les portes de la profession ; mais il faut aussi, avant qu'ils ne soient trop engagés, ouvrir les yeux de ceux qui auraient des qualités autres que celles dont l'expérience révèle qu'elles sont indispensables à l'exercice satisfaisant de la profession. L'extension des besoins et le développement concomitant de la demande, ainsi que l'attrait qu'exerce aujourd'hui ce métier, ont tout naturellement posé la question du recrutement et, pour certains, de la formation complémentaire nécessaire.

Le candidat interprète, qu'il vienne d'une autre profession ou qu'il soit étudiant, sera d'autant mieux armé pour aborder la carrière, qu'il aura reçu une formation universitaire ou exercé une profession qui lui auront appris à raisonner avec rigueur et l'auront ainsi préparé à comprendre la pensée d'autrui. En effet, les questions traitées dans bien des conférences — scientifiques, techniques, économiques ou autres — seront si diverses et si précises qu'il ne pourra se familiariser qu'avec la terminologie et des rudiments et qu'il lui faudra tabler sur sa capacité de suivre le raisonnement quel qu'il soit.

Un futur interprète a donc tout intérêt à suivre des études supérieures, universitaires, techniques, etc. Ce faisant, il s'ouvre également d'autres voies : il peut avoir à exercer un second métier, en particulier pendant la période creuse de ses débuts, ou encore il peut s'apercevoir que sa capacité de devenir interprète ne se

confirme pas : on peut satisfaire aux épreuves d'aptitude permettant d'être admis aux cours d'interprétation, mais ce n'est, en effet, qu'en fin de formation technique d'interprète de conférence que s'avère si l'on est vraiment fait pour le métier.

Il est également fort utile, à l'élève comme à l'interprète formé, de connaître ou de pratiquer la profession-soeur du linguiste : la traduction. Il peut ainsi approfondir ses connaissances linguistiques, sémantiques et philologiques et affiner sa faculté d'analyser et de transmettre le discours.

Mais il doit savoir qu'on ne peut, sans rencontrer des difficultés considérables, pratiquer ces deux disciplines en alternance trop rapprochée, au cours d'une même conférence. Les démarches intellectuelles, le rythme de transposition, sont très différents, voire opposés.

### *Débouchés*

Le nombre de candidats attirés par la profession est très disproportionné par rapport aux débouchés qui s'offrent à eux.

La profession aura toujours besoin de nouveaux éléments, en raison du développement constant des relations internationales, mais il est certain que seuls les interprètes professionnels pleinement qualifiés réussiront à s'affirmer. Si la qualité moyenne s'abaissait, les organisateurs de conférences préféreraient probablement se passer d'interprétation, plutôt que de disposer de services médiocres, d'une utilité contestable lorsqu'ils ne sont pas néfastes.

Les conférences à trois langues étant aujourd'hui les plus fréquentes, il est sage pour le candidat de n'envisager la carrière que si la langue maternelle s'assortit de deux autres langues qu'il connaît à fond. En dehors du cas, fort rare, du bilingue, qui possède à un degré égal de perfection deux langues maternelles, dont il pourra user dans des conditions d'équivalence absolue, il n'y a pas de place sur le marché actuel pour un candidat qui ne connaîtrait qu'une seule langue outre la sienne propre.

En règle générale, les langues de travail des interprètes qui désirent exercer en Europe occidentale doivent comprendre l'anglais ou le français, ou mieux encore les deux ; et sur le continent américain, l'anglais et l'espagnol. Certaines combinaisons linguistiques se trouvent rarement réunies chez un même interprète ; si elles sont précieuses, elles ne sont cependant pas forcément suffisantes : ainsi la combinaison russe-espagnol (utile à l'ONU et dans les institutions spécialisées) n'est profitable que si elle est complétée par l'anglais ou le français ; de même que la combinaison néerlandais-italien (utile dans les Communautés européennes) doit être complétée par une autre langue, par exemple le français. La connaissance de langues telles que l'arabe, le chinois ou le japonais présente un intérêt encore restreint, mais qui ne peut manquer de croître.

Les conférences techniques devenant de plus en plus nombreuses, une certaine compétence dans un sujet déterminé s'ajoute utilement aux connaissances linguistiques (médecine, physique, biologie, etc.). . .



Le futur interprète se demandera probablement avec quelque ironie, après avoir lu ce qui précède, si ses aînés se targuent de posséder eux-mêmes le large éventail de qualités qu'on lui demande de posséder. Qu'il se rassure : la description de tant de caractéristiques si variées n'implique pas la perfection dans chacune d'entre elles ; mais l'expérience enseigne qu'à des degrés divers, elles sont toutes nécessaires et que leur valeur vient précisément de leur conjonction.

1. The Linguists' Club Working Party, which was started in 1938, is the oldest conference interpreters' training centre in Europe.
2. It is guided by an Advisory Committee consisting of professional conference interpreters, all members of AIIC\* and LACI\*, under the chairmanship of A.T. Pilley (who for the past 25 years has acted as consultant for the training and recruiting of interpreters for the Foreign Office and other government departments in the United Kingdom and abroad).
3. The Working Party carefully avoids the fault seemingly inherent in the teaching at most conventional interpreters' schools, i.e. the confusion between the teaching of languages and the teaching of the interpreting technique.
4. Since experience has shown that selection is at least as important as training, entry into the Working Party is governed by a rigorous aptitude test where capacity to interpret is carefully assessed by a jury of experienced conference interpreters. Only applicants who know two or more of the standard conference languages at the requisite standard are accepted.
5. Persons are admitted who in addition to their linguistic skill have an adequate background of general education, knowledge of world affairs and the necessary temperament. They are drawn from other professions, chiefly broadcasting, journalism, teaching, law and the international civil service, and their ages usually range from 25 to 45. Working Party members are not students in the ordinary sense of the term and they normally have other occupations; thus the Working Party holds its meetings in the evening. The course is restricted to six or eight persons at a time and lasts three months to one year.
6. Teachers at the Working Party are without exception themselves practising conference interpreters. They take great care to teach the actual know-how of interpreting, concentrating on

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\*AIIC - Association internationale des interprètes de conférence  
LACI - London Association of Conference Interpreters

practice rather than theory. Every meeting follows as closely as possible the pattern of an international conference or committee meeting.

7. Members of the Working Party are introduced to the rules and mores of the profession and are frequently given the opportunity to attend conferences and to work in "dead" booths. At peak conference periods they are sometimes integrated in actual teams and asked to interpret "live".
8. Over 90 per cent of those admitted as full members of the Working Party make the grade and become conference interpreters. This compares with what is believed to be well below 5 per cent at most of the conventional schools (i.e. 5 per cent of the total at entry). This wide disparity is due to the difference of approach; those who register at the conventional interpreters' schools are at first not taught interpreting at all but only translating and background subjects; only a very small minority subsequently qualifies for training at the advanced interpreting classes or seminars. That minority includes many distinguished interpreters, but one wonders what has happened to the majority.
9. The Working Party is among the first few training centres which have supplied new entrants to the profession. It has since the war produced 31 members of AIIC and/or LACI. As may be seen from the AIIC report on schools, 1963, the Working Party's AIIC record compares favourably with that of the conventional schools. The figure of 31 must be seen in the context of what is almost certainly the smallest liberal profession in the world: at the time of writing there are less than 40 qualified conference interpreters in the U.K. There are nine permanent posts for interpreters in the whole country; the majority of practising interpreters are free-lance.
10. The Working Party system in a more streamlined form has been applied by A.T. Pilley for the training of parliamentary interpreters for the Ceylon House of Representatives (1955), the Singapore Legislative Assembly and the Malayan Parliament (1957). The same system has been commissioned for the Basutoland Parliament in 1965 and discussions are in progress for its introduction for the Parliaments of India, Northern Nigeria and Hong Kong in 1966-1967. (cf. White Paper No. L.A.20 of 1957 on *Languages in the Singapore Legislative Assembly Debates*).
11. In view of its restricted and highly specialized nature, a training group of the Working Party type cannot possibly be a viable proposition financially. It can only function if it is either a) subsidized, or b) grafted on to an existing teaching establishment. In the case of the Working Party itself the cost is shared between its members and the Linguists' Club.
12. It is considered that one of the basic "vices" of the conventional school method is that the school, in order to pay its way, to meet the expenses of rent, teachers, secretariat and overheads, is compelled to admit scores, indeed hundreds, of

students, many of whom are young and inexperienced and the vast majority of whom do not, in any case, possess the gifts and qualities which would enable them one day to become international conference interpreters.

13. It would appear that many establishments, instead of calling themselves "School of Translating and Interpreting" or even "School of Modern Languages" adopt as title the misnomer "Interpreters School" for reasons of prestige, publicity or financial profit.
14. But it is satisfactory to note that at least one enlightened and progressive school in France has implemented the AIIC recommendation that mature persons of the right calibre be admitted to the advanced class or seminar without first spending one, two or three years in the preliminary classes. It is hoped that many more will follow that encouraging example.

March, 1965

A.T. Pilley  
Director of the Linguists' Club





. . . To take selection first, we have found that the candidate, besides having a thorough knowledge of at least three languages (one of which he must speak fluently, correctly and clearly) must be a person who either through a college education, or by some other means, has acquired a good general knowledge of the matters that he will be dealing with. Here at the United Nations, for instance, he must understand matters economic, political, diplomatic, legal, colonial, social, cultural and so on. It is not enough for him to know the languages; he must be sufficiently intelligent and educated to grasp and assimilate what delegates and experts of all kinds are talking about.

Even a candidate who has the basic linguistic and general knowledge may not make an interpreter. The only way to find whether he will is to try to train him, at least for a few weeks. A good candidate may learn to interpret in a few hours, or may take a few weeks at, say, four hours a day. If a candidate is not performing reasonably well, after about thirty hours training of this kind, he is unlikely ever to succeed. If he is, then it is just a matter of giving him practice, in whatever specialty field he is going to work so that he can develop self-assurance, fluency and versatility.

As regards salaries, much depends on the nature of the subject matter of the speeches and the status and requirements of the persons for whom the interpreter works. If the subject matter is complicated and the listeners are persons of some education and eminence, the interpreter will have to be a correspondingly educated person, who will command a fairly high salary. Our interpreters are fairly high up in the professional category, comparable in status and remuneration to economists, lawyers and so on in the substantive departments. . . .

Finally, regarding conditions of work, it is difficult to be very specific as so much depends on local conditions and the number and

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\*Extracts from a letter by D. Hogg, Chief of the Interpretation Section, United Nations, to the Clerk of the Legislative Assembly, Singapore (25 February, 1957).

nature of meetings to be served. But, in general, it may be said that an interpreter can be expected to interpret for about three-quarters of a working week, say, seven or eight half-day meetings in a five-day working week, provided that the booth that he works in is properly lit and ventilated. Over a long period this may prove rather too much from the health point of view. . . .

*Question* [the Speaker]: . . . Your first suggestion then is to try to get . . . a panel of free-lance workers. That is one suggestion. Is there an alternative? If it is not possible to find free-lancing interpreters in sufficient numbers what is the next solution? . . . In Canada they have what they call a Bureau of Translation which is called upon to supply translators and interpreters whenever needed by a department. . . . Supposing this idea of a Bureau is developed, do you think that it could also be a source from which the Assembly can draw its interpreters?

*Answer* [A.T. Pilley]: I am afraid my answer to that question is emphatically - No. It is completely out of the question. I am sorry to be so brutally frank. The reason is that translating and interpreting are completely different disciplines. Very often a first-class translator is no good at interpretation and vice versa. An interpreter who is a master of speech may not even be able to spell correctly; but quite apart from the basic background knowledge, if he has a quick wit and a dynamic personality he will not be the sort of man who will like sitting down and doing written translations.

Experience in England, France, Holland, Switzerland, Belgium has shown that translating and interpreting are two completely different jobs. Many of those who have tried to combine the two (and many have tried to do so) have come a cropper. In other words, the field is so restricted. Many people in England do not even realize what a conference interpreter is. They go to a translation bureau to look for one; the bureau sends someone, say an excellent French-English translator; he goes into the booth but he cannot even open his mouth, or he makes a terrible mess because the two jobs are completely different. A translator will sit down, write a sentence, feel doubtful about a word, cross it out; he will always be seeking the most elegant word. The job of an interpreter is different—it is to get the

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\*Singapore Legislative Assembly, Debates, 1957, Sessional Paper No. LA 20. Report from the Select Committee on Languages in the Legislative Assembly Debates, pp.77 ff.



meaning across quickly. It may be that the word he has chosen to convey this meaning is not the best, but it may be exactly the word which will convey the meaning more quickly. He has to do this very quickly and has to have a very quick wit. Supposing the speaker coughs and the interpreter misses a vital word; he must be sufficiently quick-witted and honest to do one of two things—either to guess the word and weave it in, or to say into the microphone, "I am sorry, I have missed the last sentence but it was probably such and such." Now a translator cannot do that. He is much too plodding; he works in depth, while an interpreter works at speed. They are two completely different disciplines. In the United Nations none of the translators interpret and none of the interpreters translate. . . .

*Question* [the Speaker]: But do you not think that an interpreter can so adapt himself that he can sit in an office and do translation work?

*Answer* [A.T. Pilley]: Yes, it is more than likely that an interpreter can adapt himself to translate . . . but frankly I think you are on the wrong track. I think that your best chance of success is to look through a panel of university teachers, very bright third- or fourth-year undergraduates, lawyers and journalists, people active in these professions who have a lot of experience in public affairs and are accustomed to the problems discussed in the Parliament. In England, for example, one of the 20 interpreters is an authoress, two work full time for the British Broadcasting Corporation but take time off to do interpretation, and one is a barrister who occasionally likes to interpret for a conference. Those are the type of people you need, men of substance, not secretaries or even translators who may be good only at written work. The sort of men that you must look for are radio people, journalists, lawyers and teachers, not youngsters but men with poise and eloquence if you like, men of the parliamentary type. I said so to the Clerk of the House of Representatives in Colombo. He thought that I was exaggerating a bit. He advertised in the universities and other places and received some 90 applicants and reduced the list to 30. He said to me "We have many tribunals and courts and we have Tamil, Singhalese and English interpreters for the courts." I told him that I thought it was most unlikely that a court interpreter would make a conference interpreter. He also said: "We have also translation bureaux and many translators." I said, "Try out the applicants, I do not think that it is impossible to get a good interpreter from among them but I would be surprised if you do." Well, in the event, not one court interpreter or translator survived the test. The four who did were two journalists, a teacher and a man from Radio Colombo, and the two who finally turned out to be the best, on a level in quality with UN interpreters, were the man from Radio Colombo (who is in news and radio broadcasting) and one of the journalists. The third successful candidate, very good and intelligent, later became a Member of the new Ceylon Parliament. Those are the type of people who will make the grade. . . . Human beings and social problems are the same the world over, so I see no reason why you can succeed in Singapore where they have failed in London and Geneva. . . .

*Question* [the Speaker]: I suppose arising out of that part of the training will be the compilation of what may be termed a glossary of technical terms?

*Answer* [A.T. Pilley]: That curiously enough is only a minor problem. It is important but fortunately it is technically easy to solve. What they can do is work out a glossary of parliamentary terms with the help of the Clerk; they can do that within a few days. . . . It is very easy. Free-lance interpreters, for example, have to do a big variety of subjects, but they learn the different terminology easily. My own programme has included conferences on navigation, with words like mobile cranes, hatchways, automatic elevators and fork-lift trucks. I have also covered conferences on rubber in Ceylon, the Wheat Council, safety in mines for the Miners' Federation, metal boxes, a big hospital federation in Lisbon. The problem is one of detail and it is not very important—you merely have to spend a few hours or days getting familiar with the words. It is not the crux of the problem. A man with sufficient mental calibre can learn the words easily.

*Question* [the Speaker]: The point has been raised, what is the remedy if a difficult speaker is not audible or speaks too fast? . . .

*Answer* [A.T. Pilley]: Yes. That is one of the more unfortunate problems of the profession. . . . The only way to overcome it (and it is not a very satisfactory way) is to install a red light on the Speaker's table; an interpreter who is in trouble presses a switch, the red light is put on, the Speaker realizes the trouble and directs the speaker to speak into the mike. With a good chairman it may work but . . . in fact, we have almost given up the red-light system. What happens is this. The speaker on the rostrum is going too fast or is speaking away from the microphone; the interpreter presses the switch; the red light comes on but the speaker, thinking that the chairman is informing him that he has only one minute left, speaks faster still!

*Question* [the Speaker]: The red light is placed on the rostrum?

*Answer* [A.T. Pilley]: Yes. And if we put it near the chairman, he may put a book over it so he does not see it. . . . But, of course, you must be prepared for this—even when you have first-class interpreters (which is an absolutely open question) your proceedings will be spoiled to some extent by speakers who, although they may be professional and trained, may sometimes speak too quickly or are a bit confused; then the interpreter is lost and that in turn means that the assemblymen depending on him . . . will miss something. So you must not think that even with a perfect team you will get perfect interpreting service. . . . Even at the United Nations or at highest-level conferences employing first-class interpreters, things can and do go wrong. . . .



## *I. Aim and Scope*

### *Article 1*

- a) This code sets forth rules of professional conduct for members of the Association.
- b) The provisions of the code are binding upon members. Members are expected to assist the Council in enforcing them.
- c) Disciplinary measures contained in the Constitution may be taken against any member guilty of unprofessional conduct under the code.

## *II. Code of Ethics*

### *Article 2*

- a) Members of the Association shall be subject to strict professional secrecy. This applies to all persons and all information gathered in the course of non-public meetings attended in a professional capacity.
- b) No member shall derive personal profit or advantage from any confidential information acquired while acting in a professional capacity.

### *Article 3*

Members of the Association shall refrain from accepting conference engagements they do not feel qualified to undertake. Acceptance shall be regarded as guaranteeing a high professional standard of interpreting.

### *Article 4*

- a) Members shall refuse any employment or position which might prejudice the dignity of the profession or conflict with the observance of professional secrecy.



- b) Members shall refrain from any activities likely to bring discredit on the profession, including all forms of personal publicity.

#### *Article 5*

- a) Members of the Association pledge their unfailing support to their colleagues and to the profession as a whole.
- b) Any difficulty of a professional nature arising between two or more members may be referred to the Council for arbitration.

#### *Article 6*

Members of the Association shall refuse working conditions not in accordance with those laid down by the Association.

### *III. Working Conditions*

#### *A. General*

#### *Article 7*

In the interests of good interpreting, members of the Association shall:

- a) Satisfy themselves that they can see and hear properly and that adequate provision is made for their comfort;
- b) Advise against simultaneous interpretation without booth if approached to do so under conditions not consistent with a high standard of interpreting;
- c) Not work alone in a booth without relief;
- d) Undertake to do whispered interpretation only under exceptional circumstances and for a maximum of two listeners;
- e) Try to see to it that interpreting teams are made up in such a way as to avoid regular use of relays.

#### *B. Free-lance Interpreters*

##### *1. Conference engagements*

#### *Article 8*

- a) Members of the Association shall not accept any conference engagement without acquainting themselves fully with the terms beforehand; the Letter of Appointment shall be used in the form drawn up by the Association, or other appropriate form, for non-governmental conferences.
- b) When members are engaged as interpreters they may perform no other conference duties.

#### *Article 9*

- a) Members shall declare a professional domicile. No other may be used for professional purposes.

- b) The Executive Secretary shall be notified without delay of any change of professional domicile. Such changes may be made for a period of not less than six months.

#### *Article 10*

Members of the Association may request to be released from a conference engagement only if they are able to:

- a) give sufficient notice
- b) show good cause
- c) propose a substitute acceptable to the conference organizer.

#### *2. Fees*

#### *Article 11*

- a) A minimum scale of fees is kept by the Association and is appended to the code.
- b) The fees are based on a daily rate. A full day's fee shall be payable for each day or fraction thereof covered by the conference engagement.
- c) Interpreting fees are quoted in U.S. dollars. The fees shall be transferable to the interpreter's country of domicile.
- d) Members of the Association engaged to work on the same team shall be paid at the same rate.

#### *Article 12*

- a) Fees shall be due for the entire period covered by the conference engagement, including Sundays and other non-working days.
- b) Fees shall be payable in full without deduction in respect of tax or commission.

#### *Article 13*

Members of the Association may give their services free of charge, provided they pay their own travel and subsistence expenses. (The Council may occasionally waive this provision).



Simultaneous interpretation will be provided at the .....(title of conference) in ..... (languages). In order to ensure that this method is successful in enabling delegates to understand and be understood, certain essential requirements must be borne in mind by all concerned. These requirements are quite different from those involved in translation; a translator reads first and then writes, adjusting his pace of work to the difficulty of the text. The interpreter *listens and talks* simultaneously at the pace dictated by the speaker.

Because of its simultaneous nature, interpretation is in its normal element only when statements are extemporaneous, that is when the speaker's delivery is consistent with the spoken language.

This is not the case when a speaker reads or recites a concise, literary text, which has been prepared in advance. A text of this sort, which is the product of long and careful drafting, cannot be adequately interpreted when read off without warning; it would more properly be handled as a written translation.

Nonetheless, to enable prepared texts to be interpreted, it is essential that the interpreters, like the speakers, be given an opportunity to acquaint themselves with their content prior to the congress, and do such preparatory work as may be necessary.

You are therefore requested to send us ..... copies of the text of your paper by ..... (date), *for communication to the interpreters.*

Since the rate of delivery for the purposes of interpretation must not exceed 10 lines per minute, your text must not exceed ..... lines, for which the time allotted to you at the rostrum will be .... minutes. The time taken over showing slides comes out of the allotted speaking time. If you intend to show slides your text should be shortened accordingly.

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\*From the *Practical Guide For Users of Conference Interpreting Services* published by the Union of International Associations (International Congress Science Series, Brussels, 1966), 22.



Anything longer than what is indicated above would require to be read too fast for proper understanding and interpretation. When addressing the meeting you are advised to do so in a style as far as possible approximating that of impromptu speech. The text of *this* address, in a clearly legible copy with wide spacing, should be given to the interpreters. A fuller, more elaborate text may be provided for inclusion in the published proceedings.

If you do not wish to write out your address in full, and prefer to use notes or to speak from memory, there are no special requirements regarding your rate of delivery. It may however be useful to let the interpreters have as full as possible an outline of what you intend to say.

In sending your texts, please indicate if possible any *terms or bibliographical references* which might further assist the interpreter in his work.

It should be noted that where a speaker departs from his text, the interpreters base their translation on the spoken word. Unscripted statements can be adequately interpreted provided they are spoken distinctly.

It will not be possible to provide interpretation for written statements when their content has not been communicated to the interpreters beforehand. This applies equally to scripted comments during discussion. Inasmuch as they are not extemporaneous, they must be treated as written communications.

## Chapter I

1. Epilogue to McGill University's brief to the Royal Commission on Bilingualism and Biculturalism.
2. Council for International Organizations of Medical Sciences, *The Planning of International Meetings* (Oxford, 1957), a handbook published under the joint auspices of UNESCO and WHO, says:  
"Before going into detail, we shall clarify the meaning that the words 'translation' and 'interpretation' have acquired in the rather specialized terminology of international organizations. The word 'translation' should be restricted to written communications. The word 'interpretation' on the other hand should be used when referring to the extemporaneous verbal rendering in another language of a spoken or written statement."

## Chapter III

1. W. Keiser, an outstanding interpreter, writes in a letter from Brussels dated 14 November, 1965: ". . . in the last two years, the UN and its Specialized Agencies have probably been overtaken, in the number of interpreters employed per annum, by the group of organizations belonging to what is commonly called L'Europe des Six, i.e. the Common Market Organization, Euratom, the Coal and Steel Community. . . . Of these, the first-named alone had no less than 17,500 interpreter-days in 1964, with an average of some 120 interpreters working there practically every working week all through the year (permanent staff plus free lances). It is also in this circuit that there still are a considerable number of permanent jobs available."
2. See n.2, Chap.I.

## Chapter IV

1. L'Association internationale des interprètes de conférence, "Rapport du Président de l'AIIC à l'Assemblée de 1963" (Paris, 3 mars 1963; mimeo).
2. AIIC, paper DA/9/08 (1958).
3. *Ibid.*
4. The author owes the description of language "ways" to a distinguished colleague, A. T. Pilley of London—as explained *inter alia* in his pamphlet, *The Techniques of International Conference Interpreting* (Institute of Linguists, London, 1960).
5. AIIC, "Rapport du Président, 1963."
6. *Ibid.*
7. Article 3. See Appendix E.
8. Union of International Associations, *Practical Guide for Users of Conference Interpreting Services* (International Congress Science Series, Brussels, 1966).

## Chapter V

1. This may seem a cavalier way of writing off an unusual page of history; there is, however, a good deal of literature on the subject. See, e.g., Harold Nicholson, *Diplomacy* (3rd ed., London, 1963), Chap.X.
2. AIIC, *Plaquette d'orientation professionnelle* (Paris, 1964).
3. See Appendix D.
4. Obtainable from the AIIC Secretariat, 33 rue des Archives, Paris 4e.
5. AIIC (Paris, Nov., 1964).
6. Notably *Practical Guide for Users of Conference Interpreting Services*. See n.8, Chap.IV.
7. The American Association of Language Specialists; Executive Secretary, 1718 Eye Street N.W., Washington, D.C. 20036, U.S.A.

## Chapter VI

1. The Royal Commission on Bilingualism and Biculturalism, *Report*, Bk.I "The Official Languages" (Ottawa, 1967) states (p.6): "In fact, this phenomenon [an equal command of two languages] is so distinct as to have a special name, 'equilingualism'."
2. Letter to the author, 1966.

## Chapter VII

1. See Appendix A.
2. For more details on this see T. Nilski, "Translators and Interpreters--Siblings or A Breed Apart?" in *Meta*, XII, no. 2 (June, 1967).
3. Letter to the author.

## Appendix A

1. See very interesting report on occupational health hazards published by AIIC in 1963, based on articles by W. Keiser and E. Meister in *L'Interprète*, XVIII, no. 1 (February 1963), a periodical published in Geneva. In 1968-69, AIIC appointed a Committee on Health Matters which, in cooperation with medical specialists and WHO, is gathering material on the subject and submitting it to scientific tests.





















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